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INSANITY

CONSIDERED IN ITS

MEDICO-LEGAL RELATIONS.

"ORNARI RES IPSA NEGAT, CONTENTA DOCERI."

BY

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TO THE

HONORABLE THOMAS M. COOLEY, LL.D.,

ETC., ETC., ETC.,

ASSOCIATE JUSTICE

OF THE

SUPREME COURT OF MICHIGAN,

WHOSE ERUDITION AND ABILITIES HAVE ADORNED THE LEGAL PROFESSION OF THIS COUNTRY,

THIS WORK,

WITH GRATEFUL ACKNOWLEDGMENT OF IMPORTANT AID IN THE PREPARATION OF THE LEGAL SECTIONS, IS, WITH HIS PERMISSION,

RESPECTFULLY DEDICATED

BY THE AUTHOR.

PREFACE.

In preparing this work for the public the chief objects in view were to point out the pernicious uncertainty of verdicts in insanity trials, with the hope that by arousing attention to the magnitude of the evil, at least, some of the more objectionable features of our medical jurisprudence may be removed; to faithfully call attention to the more prominent causes of that uncertainty; "to hold as 'twere the mirror up to nature; to show virtue her own feature, scorn her own image;" and, with the most friendly feelings for both my own and the legal profession, to criticise severely, and to censure when necessary, not the individuals, but the system which has made insanity trials a reproach to courts, lawyers, and the medical profession. My intention at the first was to prove every proposition introduced *ab initio*, but after carrying out the intention for some time, I found I had written over seven hundred pages, and had not then fairly commenced the discussion of the points particularly contemplated; and, believing that

few readers would be content to toil through so many pages of preliminary matter; and, that in place of *one small* volume, there would be *several large* ones; that part of my plan was abandoned, and instead I have laid the *conclusions* of standard writers under large contribution, with just enough of the authors' reasoning to give them coherence, referring in every case to the work quoted, so that my readers may investigate the subject more fully if they so desire. By the aid of the "*physical media*" theory here introduced, and, I think fully established, by abolishing legal tests of insanity so called, and by securing efficient, trustworthy expert testimony in every trial, through the scheme herein proposed, it is believed that the disgraceful, haphazard trials of the past, and present, will give place in the future, to trials as orderly, and in which verdicts will be regarded as certain and trustworthy, as those in any other class of cases brought before the courts. The work being designed for members of the legal, as well as of the medical profession, the use of technicalities, psychical, metaphysical, and medical, has been studiously avoided.

THE AUTHOR.

FLINT, MICH., 1883.

CONTENTS.

CHAPTER I.

INTRODUCTORY.

CHAPTER II.

"PHYSICAL MEDIA THEORY" INTRODUCED AND DISCUSSED WITH THE "PSYCHICAL" OR "METAPHYSICAL" THEORY.

CHAPTER III.

THE SOMATIC THEORY.

CHAPTER IV.

THE INTERMEDIATE THEORY.

CHAPTER V.

EXPERTS.

Definition of Experts in Insanity—General Medical Practitioners are not Experts in Insanity—Non-Experts ought not to be allowed to give Evidence as Experts—Result pernicious when so allowed—Precedent—Many Legal "Precedents" discarded Medical Opinions—Importance of studying the Reasons which underlie Judicial Decisions—Conflict between Expert Opinions and Legal Tests—The Question of Responsibility considered—Crime cannot be committed by an Insane Person—Insanity a Question of Fact for the Jury, not of Law for the Judges—Only Experts can diagnose Insanity—Hypothetical Cases—How prepared—Want of Opportunity and Skilled Observation—Prepared by Interested Parties—Deceptive and Untrustworthy—Alleged Insane Prisoners should be sent to Insane Asylums, and Superintendents after Examination should depose directly to the Question of Insanity—Sanity or Insanity of Testators—Guiteau Trial—Responsibility already fixed by

APPENDIX.

JUDGES' OPINIONS.

(The figures refer to the section.)

MEDICO-LEGAL RELATIONS OF INSANITY.

CHAPTER I.

INTRODUCTORY.

Uncertainty of Verdicts in Insanity Trials—Aim and Scope of this Work—Causes of Uncertainty—Insanity not understood—Definitions of Insanity—Legal Tests and Definitions—Contradictory Opinions of Judges—Improper Use of the Term "Expert"—Taylor's "Ordinary Rule of Society" Test examined—Conclusion reached—Illustration, the Eucharist—General Conclusion reached that, "no Unreasonableness of Belief, nor Extravagance in Behavior is *alone* Conclusive Evidence of Insanity."

§ 1. That a feeling of profound and general distrust prevails with reference to legal decisions in all cases in which insanity is an element of the trial, is an under-statement of the fact. One of the ablest medico-forensic writers[1] states: "It is notorious that the acquittal or conviction of a prisoner when insanity is alleged *is a matter of chance.* Were the issue to be decided by tossing up a shilling, instead of by the grave procedure of a trial in court, it could

[1] Maudsley, Responsibility in Mental Diseases, p. 101.

hardly be more uncertain. The less insane person sometimes escapes, while the more insane person is sometimes hanged; one man laboring under a particular form of derangement is acquitted at one trial, while another having an exactly similar form of derangement, is convicted at another trial."

Another eminent medical jurist,[1] an acknowledged authority, both in this country and in Britain, says: . . . "acquittal on the plea of insanity is, on some occasions, *a mere matter of accident.*" "Either some persons are improperly acquitted on the plea of insanity, or others are unjustly executed;"[2] and, unfortunately, the *facts,* on a careful examination of the subject, fully corroborate this severe arraignment of the jurisprudence of insanity. Is not the travesty of justice shocking? *Guilty persons acquitted and innocent persons hanged in the sacred name of justice,* after an intended impartial legal trial! The thought is appalling, and the magnitude of the evil cannot easily be exaggerated. Independent of the injustice to individuals and to society, possibly no greater calamity can befall a nation than to lose confidence in the judiciary thereof.

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[1] Taylor, Med. Juris., vol. ii. p. 589.

[2] Ibid., p. 580.

Apart from "insanity trials," our judicial decisions give very general satisfaction, and are received with confidence by the people. The probity and ability of our judges have rarely been challenged. The ability of the bar of this country is unquestioned, and from no people can more intelligent and trustworthy jurors be drawn than from American citizens. Possessing unimpeachable judges, able lawyers, and intelligent jurors, all the elements of eminently reliable courts, why is it that verdicts in a large class of cases are not at all to be depended upon—are so uncertain that they command neither the respect nor confidence of the people, and are therefore shorn of the moral force and influence that properly appertain to judgments of courts?

§ 2. That such uncertainty of verdict exists, or is possible, postulates some grave error or defect in the judicial proceedings, and consequently the interests of society, of the judiciary, and of all persons connected with insanity trials demand a searching investigation, to discover if possible the cause or causes, the persons or classes, responsible for the miscarriage of justice, and to devise such remedies as, properly applied, will insure reasonable certainty of true verdicts in all insanity cases, "a consummation devoutly

to be wished," which, if obtained, would render life and liberty more secure, and erase the foul blot that mars the otherwise fair record of our judicial proceedings. Such is the task undertaken by the writer.

§ 3. Doubtless, underlying the whole subject of the jurisprudence of insanity, as a potent cause of the uncertainty of verdicts, is the fact that the real premises are imperfectly understood. At every trial the question, "What *is* insanity?" is reiterated, and no definition has yet been furnished that commands general credence and acceptance. The opinions of the courts, as expressed in their rulings and charges to juries, are contradictory one of another, and physicians called to testify as experts exhibit in their evidence anything but uniformity of opinion. What do authorities say as to this?

§ 4. Webster defines insanity as "the state of being insane; unsoundness of mind; derangement of intellect; madness." Worcester, as "the state of being insane; lunacy; mania; want of sound mind; madness; delirium." These authorities do not help us, as, according to them, insanity is a want of sound mind, madness, lunacy, mania, and delirium; and what are delirium, mania, lunacy, madness, and want of sound mind? Insanity, of course. Lexicogra-

phers afford us no aid. We shall now consult metaphysicians, psychologists, and medical jurists. Locke defines a madman to be "one who reasons correctly from false premises." Cullen defines insanity to be "a lesion of the intellectual faculties, without pyrexia, and without coma." Abernethy, as "the loss of the faculty of attention." Combe says, "It is a prolonged departure, and without an adequate external cause, from the state of feeling and modes of thinking usual to the individual who is in health; that is the true feature of disorder of the mind." And the same writer gives another definition, in which he characterizes insanity as "a morbid action in one, in several, or in the whole of the cerebral organs, and, as its necessary consequence, functional derangement in one, in several, or in the whole of the mental faculties which these organs subserve." Connoly, "a disorder of the power of comparison or judgment." Guislam, "a derangement of the mental faculties, morbid, apyrexial, and chronic, which deprive man of the power of thinking and acting freely as regards his happiness, preservation, and responsibility." Lélut, "a lesion in the association of ideas." Marc, "the loss of the faculty of volition." Morel, "a cerebral affection, idiopathic or sympathetic, destroying the in-

dividual's moral liberty, and constituting a derangement of his acts, tendencies, and sentiments, as well as a general or partial disorder of his ideas." Copland, "a deviation from, or perversion of, the natural or healthy state of the mind, as manifested either by the moral emotions and conduct, or by a partial or general disorder of the intellectual powers and understanding." Taylor says,[1] "The terms insanity, lunacy, unsoundness of mind, mental derangement, mental disorder, madness, and mental alienation or aberration have been indifferently applied to those states of disordered mind in which a person loses the power of regulating his actions and conduct according to the ordinary rules of society." Definitions and criteria of insanity might be quoted almost indefinitely, as the number is limited only by the number of writers on the subject, but enough have been referred to to show that there is none that commands general assent, because had one been found wholly trustworthy, all others would have been discarded.

§ 5. Let us now turn to the law. It has to deal officially with insanity. What settled tests or well-defined criteria have the courts which may be invoked

[1] Med. Juris., vol. ii. p. 476.

in determining responsibility where insanity is alleged as a defence, or bar to punishment for crime committed? Unfortunately, an examination of "judges' opinions" proves that what has been shown to be confusion among psychical authorities is, with the added contradictory rulings of the courts, "confusion worse confounded."

Giving in a few words or sentences the following legal tests or criteria of insanity, it will be impossible in every, or indeed in any, case to convey the *exact* shade of thought, with the nice distinctions, as expressed by the learned judges in their elaborate opinions. To guard, however, against even the appearance of misrepresentation, reference will be made to the Appendix "Judges' Opinions,"[1] giving in every case the section, and name of the judge whose opinion is epitomized.

"General insanity would necessarily preclude a trial, as a person in that condition can make no defence whatever." Beardsley, C. J., § 76.

"That you are of unsound mind I believe, but that is no reason why you should not be punished, as an example to others." Bramwell, B., § 73.

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[1] *Vide* Appendix, pp. 221–250.

"To execute an insane person is against law, and of extreme inhumanity and cruelty, and can be no warning to others." Sir Edward Coke, § 73.

To relieve from responsibility, insanity must be absolute; a man must know no more than an infant, a brute, or wild beast. Tracy, J., § 72.

Absolute insanity not necessary; if the prisoner was insane *with reference to the crime charged*, it is sufficient. Beardsley, C. J., § 76.

It must be clearly shown that the accused did not know right from wrong. Partial insanity no bar to responsibility. English Judges in Conference, § 74.

The preceding opinion designated "exquisitely inhumane" and absurdly impracticable. Ladd, J., § 75.

"The test lies in the word 'power.' Had the accused power to know right from wrong, and had he power to adhere to the former and avoid the latter?" Brewster, J., § 76.

The law does not recognize "uncontrollable impulse" if the prisoner knew right from wrong. Alderson, B., § 79.

There is an uncontrollable impulse, or irresistible inclination to kill, which, when proved, relieves from responsibility. Gibson, C. J., § 80.

"If he knew that he was committing an act against

God and nature, he is responsible." Lord Lyndhurst, § 77.

"If the person acted under uncontrollable impulse, notwithstanding his knowledge, the act was not his act; hence he is not responsible." Shaw, C. J., § 80.

"Moral insanity" affirmed to be held a good defence by all enlightened jurists. Robertson, J., § 81.

"Moral insanity" denied as being a good defence, and the opinion that it was, declared to be a most startling, irresponsible, and dangerous doctrine, unknown to the courts of last resort in either Britain or this country. Williams, C. J., § 82.

If he did not know that the act he was doing was wrong, he is not responsible. Tindal, C. J., § 78.

If he knew that the act was wrong *at the time he committed the deed*, he is responsible. Parke, B., § 78.

"The defence must prove absolute alienation beyond all doubt, such insanity as would prevent the accused from knowing that murder was a crime against the laws of God and nature, and '*that there was no other proof of insanity which would excuse murder or any other crime.*'" Sir James Mansfield, § 77.

An insane man cannot commit a crime. If there

is a doubt of the insanity, how can the jury say a sane man committed the crime? A reasonable doubt as to insanity should avail as much as a doubt of any matter of fact. Crawford, J., § 86.

The onus of proving insanity is on the accused, and if left in doubt, the jury should convict. Rolph, B., § 83.

The onus of proof of insanity, as well as of guilt, rests on the state after *the presumption* of sanity has been removed by the defence. Cooley, C. J., § 84.

The proof of insanity to acquit should be as strong as the proof of guilt to convict. Hornblower, C. J., § 83.

If the jury entertain a *reasonable doubt* of insanity, they ought to acquit. Doe, J., § 86.

A *preponderance* of evidence in favor of insanity should acquit. Shaw, C. J., § 85.

Whether there is such a mental disease (dipsomania) is a matter of science and of fact, not of law. Smith, C. J., § 87.

If he knew that the act was a crime forbidden by the law, he was responsible. Lord Brougham, § 77.

There are no legal tests of insanity. When the judge gives a legal test of insanity, he either testifies to a question of fact, or the expert witness has testi-

fied to a question of law. Thus the law is brought into conflict with itself. Doe, J., § 87.

The introduction of medical opinions and theories in the subject of insanity has proceeded upon the vicious principle of considering insanity a disease. Lord Chancellor Westbury, § 88.

Judges and lawyers, profoundly ignorant of insanity, have invaded the province of medical experts, the province of those who know all that is known on the subject, and for legal tests use exploded obsolete medical theories. Doe, J., § 89.

Ordinary men of the world just as competent as witnesses as medical experts in insanity cases. Bramwell, B., § 90.

Medical experts are infinitely better qualified to judge of insanity than are courts or lawyers. Ladd, J., § 91.

Expert testimony not only of no value, but worse than that. Davis, J., § 90.

Expert testimony of great weight, and deserves the respectful consideration of the jury as competent evidence. Shaw, C. J., § 91.

The whole difficulty is that courts have undertaken to declare that to be law which is a matter of fact. All symptoms and all tests of mental disease

are purely matters of fact for the jury, and not matters of law for the judge. Doe, J., § 87.

§ 6. In the foregoing comparatively few utterances of the courts, what phase or degree of insanity, as relieving the individual from responsibility, has not been authoritatively affirmed and authoritatively denied? An insane person cannot be tried for crime; insanity must be absolute; partial insanity sufficient; the insane must be punished as a warning to others; punishing an insane person extremely cruel and inhumane, and no warning to others; must know right from wrong; must know right from wrong *at the time;* must know right from wrong at the time, and *that the act charged was wrong;* insanity must be proved beyond a doubt; a preponderance of proof of insanity sufficient; if any reasonable doubt of insanity exists, acquit; the onus of proof of insanity on the defence; the onus of proof on the State; medical opinions and theories in insanity cases are vicious; medical experts know all that is known on the subject; judges and lawyers profoundly ignorant of insanity; expert testimony of high value; expert testimony worse than valueless; and last, but not least, *there are no legal tests of insanity.* These propositions, and many more, have all been affirmed as ques-

tions of law, and, unfortunately, the changes of legal tests appear to have little relation to time; they do not keep pace with our increased knowledge of insanity, as the opinions of the English judges in conference, designated by Judge Ladd as of "exquisite inhumanity," and absurd, were delivered less than forty years ago, and the savage dictum of Baron Bramwell was uttered in 1860, while the exquisitely humane opinion of Sir Edward Coke was delivered three centuries ago, ere the subject of insanity had emerged from the thick superstitious gloom with which it was enshrouded, when the loss of reason was looked upon as a dire disgrace,—the special visitation of the Almighty in his anger, or as a direct demoniacal possession.

§ 7. With such variable legal criteria in insanity trials, is it surprising that there should be uncertainty of verdict? The legal tests appear to be as untrustworthy as are the psychical definitions, and, as if the diversity and mutability of criteria were not enough, the almost invariable practice of allowing, and requiring general medical practitioners, who, in a critical sense, know nothing whatever of insanity, to testify as experts, removes the little remaining probability of uniformity of procedure or certainty of verdict.

It is obvious that no metaphysical or psychical definition or legal test has yet been found which can be safely invoked to determine the sanity or insanity of prisoners charged with the commission of crime; nor do we think a safe criterion ever will be found, for reasons which will be presented when inquiring into the *nature* of insanity.

§ 8. Dr. Taylor says:[1] "Many attempts have been made by psychologists to define insanity; but the definitions . . . are defective, inasmuch as they are not adapted to the various forms of the disease." Messrs. Wharton and Stillé do not attempt a definition; they say:[2] "To those who have examined that portion of the preceding pages which treats of the legal relations of mental unsoundness, it will be obvious that no hypothesis can be constructed which will meet with exactness every possible future case. No general definition has therefore been attempted, and it is sufficient at present to notice the three prominent hypotheses by which the *cause*, rather than the *nature*, of mental unsoundness has been explained. This examination is here made more thorough, from the fact that it is upon the result of this inquiry that the phi-

[1] Med. Juris., vol. ii. pp. 476–7.

[2] Med. Juris., § 318.

losophy of the common law doctrine of insanity must depend." Definitions and criteria, legal, moral, and intellectual in their scope, must therefore be discarded, as, with a single exception, one after another of them has repeatedly been shown to be untrustworthy. The exception referred to is the criterion laid down by Dr. Taylor, known as the "ordinary rule of society" test, which is sometimes invoked; and not being aware of the existence of any analysis of it, a brief examination of its claim to be considered a criterion of insanity will be made before entering upon the discussion of the "three prominent hypotheses."

§ 9. Dr. Taylor says:[1] "The terms insanity, lunacy, unsoundness of mind, mental derangement, mental disorder, madness, and mental alienation or aberration have been indifferently applied to those states of disordered mind in which a person loses the power of regulating his actions and conduct according to the ordinary rules of society."

That which is to be used as a criterion or rule of judgment must itself be a fixed quantity if it is expected that conclusions deduced therefrom will be exact and uniform; that which is mutable cannot

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[1] Med. Juris., vol. ii. p. 476.

properly be used as such standard. At what time in the world's history have "the ordinary rules of society" been of Medo-Persian immutability? What are "the ordinary rules of society" to-day, what were they a hundred years ago, and what will they be a century hence? There are in society three grades of men,—those who are abreast with, those who are behind, and those who are intellectually in advance of the times in which they live. It would be manifestly unjust to judge those who are either before or after their own times by "the ordinary rules of society," because they do not properly belong to that period, and the world's greatest men have almost invariably been in advance of their own times.

Had Galileo not been in advance of the age in which he lived, he would not have been persecuted for asserting the earth's diurnal motion and its motion round the sun. Festus declared Paul to be mad through much learning because he expressed a new and strange belief, at variance with "the ordinary rules of society" in Judea, and yet, Festus and society to the contrary notwithstanding, the mad doctrines of Paul are now, and have been for centuries, believed by the majority of the civilized world, giving tone and direction to society. A little less than two hun-

dred years ago a person living in Salem, Massachusetts, judged by the "ordinary rules of society" of that day, would have been thought insane if he could not believe in witchcraft; to-day, in the same city, judged by the same standard, he would be considered a lunatic if he did. It is unnecessary to multiply illustrations showing the variableness of "the ordinary rules of society," as even a cursory examination of the subject will convince any person that they are different to absolute contradiction in many particulars, in different ages, in different countries, nay, even in different localities of the same country. That anything so changeable as "the ordinary rules of society" should ever have been thought of as a standard of judgment in insanity almost passes belief, and yet, reader, your sanity and mine may be determined by that criterion, as it is found in a work that is considered "good authority" on medical jurisprudence at the present time. But another important question arises: How nearly complete must be the agreement with, or how great must be the divergence from, "the ordinary rules of society" to constitute a person sane or insane? To which of the social commandments must we yield implicit obedience, and which of them may we break with impunity without ren-

dering ourselves obnoxious to the charge of lunacy? There is no authoritative answer furnished, nor can there be, because there is, in fact, no code established for the regulation of society. The usual method employed, however, is to call a number of physicians to testify as experts in the premises. Why are medical men called upon to give evidence, as if they were the sole exponents of the ordinary rules of society, when but few doctors are society men at all? The procedure is absurd, but not more so than calling general medical practitioners as experts in insanity, because in no strict use of the term are they experts,—persons specially skilled in either the "rules of society" or insanity. Mark the apparent contradiction. Taylor says:[1] "In an insane person there may be no bodily disease;" and yet he and all other medical jurists, most of whom deny the *physical* origin of insanity, nevertheless insist upon employing physicians as experts in insanity. Does not this indicate most forcibly that the writers have an undefined conviction, after all, that insanity is a physical disease to be determined by physicians; but, unfortunately, the conviction lies at such a profound

[1] Med. Juris., vol. ii. p. 476.

depth in their consciousness that they are unable to formulate it distinctly for themselves, or to express it in lucid sequence to the apprehension of others? It is not enough to say that the test in question is untrustworthy; its basis is unsound, as *no departure, however great, from "the ordinary rules of society," no unreasonableness of belief, nor extravagance in conduct or behavior, is alone, conclusive evidence of insanity.* From a multitude of illustrations at our disposal we select one which proves the above proposition.

§ 10. The devout Roman Catholic receives a wafer which he knows is made of flour and water, but after consecration by an ecclesiastic he believes the wafer to be changed to flesh. That belief is not confined to an isolated few, as more than half the Christian world so believe; nor is it confined to the ignorant or uneducated, as, aside from the literary among the laity, it is believed by the priesthood and hierarchy of the papal church, a body of men, who, for character, education, and scientific attainments are perhaps the peers of any other class. The consecrated wafer may be subjected to chemical analysis by one of themselves, the result, hydrated flour, and yet, in defiance of the demonstration by one of the exactest, most reliable sciences, and despite the evidences of

their senses, hundreds of thousands of the most learned, most scientific men, including the analyst himself, still believe the consecrated wafer to be veritable flesh, and millions have so believed since the doctrine was first promulgated.

The most momentous interests are ordinarily decided by the evidence of any one of our senses. The judge and jury form their opinions from what they hear; the witnesses testify to what they saw; and thus from the *sight* of the witnesses and from the *hearing* of the court and jury the most important suits are determined by the universal consent of mankind. Yet, in determining the constituents of the consecrated wafer, we have the evidence, not of one sense alone, but the corroborative evidence of *four* out of our *five* senses,—sight, touch, taste, and smell, —to which is superadded the scientific demonstration, all emphatically testifying that the consecrated wafer is not flesh, and yet millions upon millions believe and have believed in the sacred transubstantiation, the evidence of their senses and scientific demonstration to the contrary notwithstanding. Will any person dare to pronounce that belief evidence of insanity? The supposition is preposterous; and yet there cannot be found among the ravings of the most insane a

statement of belief more at variance with the evidence of our senses and of science.

For an illustration of extravagance in conduct in persons of whose sanity there can be no question, from an almost limitless historical storehouse, we think a reference to the disciples of Ignatius Loyola will suffice.[1] The self-imposed flagellations and tortures publicly inflicted upon themselves by the Jesuits could not easily be surpassed in wild extravagance, and yet no sane man would hazard the opinion that that most wonderful organization was composed of lunatics; therefore the conclusion is inevitable that "*no unreasonableness of belief nor extravagance in conduct or behavior is alone conclusive evidence of insanity.*"[2]

§ 11. Assuming that "the ordinary rules of society" test or criterion has been shown to be as untrustworthy as those previously referred to, which have been examined by others and found wanting, the "three prominent hypotheses" of Messrs. Wharton and Stillé will now be considered, and as their "Medical Jurisprudence of Insanity" is so much more extensive than that of any other writer on the subject in this country, that it embraces all the important opinions

[1] See History of the Jesuits, Steinmetz *et al.*

[2] Ante, p. 31.

and is in general accord with the views of all American medical jurists (excepting Dr. Ray's advocacy of moral insanity), reference will be made almost exclusively to the text of their work in the further discussion of the tests, theories, and hypotheses of insanity in their *medico-legal relations.*

The three prominent hypotheses referred to are the "somatic or materialistic," the "metaphysical or psychical," and "the intermediate." The two former *theories* have existed for ages; the latter *hypothesis*, we believe, owes its being, in its present proportions, to the writers referred to. The most marked divisions of the subject are the "somatic" and "metaphysical"; the former denying and the latter affirming the mind to be a distinct entity, not dependent upon the body for its existence.

The "psychical" or "metaphysical" theory will be considered first, and while examining its applicability to insanity we shall introduce the "*physical media*" theory, and, we think, fully establish it. The expediency of considering these two theories together arises from the fact that much of the evidence and many of the arguments used in proving the one disprove the other; hence by treating them together useless and tedious repetitions are avoided.

CHAPTER II.

"PHYSICAL MEDIA THEORY" INTRODUCED AND DISCUSSED WITH THE PSYCHICAL OR METAPHYSICAL THEORY.

Crime cannot be committed unless there is a Mind to will and a Body to execute—Medical Jurisprudence has nothing to do with either Mind or Body if separated—What is Mind?—No Direct or Primary Evidence of the Existence of Mind—Importance of the Body—Sensations—Diseased Organs produce Disordered Sensations—Diseased Organs of Transmission produce Distorted Mental Manifestations—Distorted or Abnormal Mental Manifestations are called Diseases of the Mind, Insanity—No Proof that the Mind is ever diseased—Medication of the Insane irrational if the Disease is Mental—Definition of Disease—Partial Insanity impossible according to the Psychical Theory—Insanity does not prove that it is the Mind that is diseased—Evidence in favor of the "Physical Media Theory" from the Physical Expression of Mental Emotions—The Mental Manifestations in Diseases (Fevers, Inflammation of the Brain, etc.)—Insane Delusions induced and removed at will by Medicines—Post-Mortem Disclosures—Cases reported—Evidence from Small Brains—Brain the Organ of Mind—All Experts believe Insanity to be a Physical Disease—Evidence from Insane Asylums—Conclusions reached—Definition of Insanity—Corollary.

§ 12. THE "Physical Media Theory," like the "Metaphysical Theory" regards the mind as a distinct, intangible, incorporeal entity, not dependent upon the body for its existence; but, unlike the

"Metaphysical Theory," it recognizes the most intimate relations between mind and body, and holds that in this life the mind is *wholly dependent* for the manifestations of its operations on certain organs of the body which we designate "*physical media.*"

Whether the mental part of man is capable of an independent existence; whether it will so exist as a disembodied spirit, with capacity for exquisite enjoyment or intense suffering, is a question of all-absorbing interest to the individual and to the race; but, important as it is *per se*, it does not properly form a part of the discussion of the "*Medico-legal Relations of Insanity.*" The expert, the medical jurist, and the law have to deal with the mind only *when connected with the body*, the *individual* comprising both the mind and the body. It will not be alleged that the mind, *unless associated with the body*, can make a will or commit a crime of which human laws can take cognizance, nor can the body without the mind. The act does not make a person guilty unless the intention be guilty also.[1] Hence to the medical jurist the mind and body together constitute the individual, as only when so considered can there be any legal

[1] "Actus non reum facit nisi mens rea."—*Legal maxim.*

responsibility. Suppose it possible for the mind, without the aid of the body, to imagine, plan, reason, and speculate, as long as those mental operations remain *unacted* there can be no legal interference. It is only when the body responds to the mental urging, by word or act, that the individual may become amenable to the courts; but that the mind, while a part of the individual, can be independent of the body so as to plan or reason is only a supposition, because we know absolutely nothing of the mind *per se*, which fact is admitted by all who claim for it existence as an independent entity.

Herbert Spencer says:[1] "To write a chapter for the purpose of showing that nothing is known, or can be known, of the subject which the title of the chapter indicates (the substance of mind), will be thought strange. . . . For if by the phrase 'substance of mind' is to be understood mind as qualitatively differentiated in each portion that is separable by introspection but seems homogeneous and undecomposable; then we do know something about the 'substance of mind,' and may eventually know more. *Assuming an underlying something*, it is possible in

[1] Principles of Psychology, vol. i. p. 146.

some cases to see, and in the rest to conceive, how these multitudinous modifications of it arise. But if the phrase is taken to mean the underlying something of which these distinguishable portions are formed, or of which they are modifications, then we know nothing about it, and never can know anything about it. It is not enough to say that such knowledge is beyond the grasp of human intelligence as it now exists, for no amount of that which we call intelligence, however transcendent, can grasp such knowledge."

What the mind is we do not know. But, startling as that admission may appear to those who have not given the subject close attention, the statement *that we have no direct or primary evidence that we possess a mind at all* will be more surprising; yet such is the fact.

By direct or primary evidence is meant that which appeals for confirmation to one or more of our senses. We cannot see, hear, taste, touch, or smell the mind; it is not patent to any of our senses; and therefore we have no *direct* or *primary* evidence of its existence. I am aware that it is held by many that what we call *our own consciousness* is direct evidence of the strongest kind, but the objection arises, how can we be conscious of anything unless through the organs of sense,

the sensorium? While a very interesting question to the psychologist, it is unnecessary to determine, for the purposes of this work, whether or not the sensorium is indispensable to consciousness; because, the result affects the individual alone, and cannot be used as proof of anything, for every one will believe *his own* consciousness rather than that of any other person.

§ 13. The somatists, noting the indispensability, and marvellous adaptability, of our physical structure for expressing mental operations, conclude that mind is simply a function of the nervous system, the most highly organized part of our structure, and many ingenious hypotheses have been offered, tracing with more or less exactness and plausibility the molecular changes which generate thought and the other attributes of mind; but, we think they fail to establish *the theory of materialism.* While many metaphysicians, psychologists, and theologians appear to run to the opposite extreme, unduly exalting the mental, they as unjustly degrade and hold in comparative contempt that most transcendently perfect mechanism, the human body, asserting, often with more regard to rhetoric than to logic, that the body is but an encumbrance to the mind. The Apostle Paul appeared to hold it in higher estimation when he made its resur-

rection the test of the truth of the whole fabric of the Christian religion: "But if there be no resurrection of the dead, then is Christ not risen; and if Christ be not risen, then is our preaching vain, and your faith is also vain. Then they also which are fallen asleep in Christ are perished."[1]

§ 14. Whether there are stored up in the human ova,—the germs of our being—potentialities and capacities, which irresistibly determine character, transmitted through countless generations of ancestors, as taught by many eminent writers,[2] is a question that will receive consideration in its proper place. Whatever may be the latent powers and capacities of the infant, we know that the senses furnish the conditions of knowledge. "It is obvious that we cannot go back

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[1] 1 Corinthians xv. 13, 14, 18.

[2] Prominent among the school of writers referred to is Dr. Maudsley, who says:* "Not only has the human ovum this destiny of the species in its nature, but each particular ovum has an individual inheritance which makes for it an individual destiny. Men are in much alike, but each individual differs in some respects from any other individual who now exists, or, it may be confidently assumed, ever has existed, or ever will exist. And this is not a difference which is due to education or circumstances, but a fundamental difference of nature which neither education nor circumstances can eradicate."

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* Responsibility in Mental Disease, p. 21.

in personal experience to the rise of self-consciousness with the view of constructing a history of the development of our knowledge. Nor will observation of the dawn of intelligence in the life of a child supply what is required. There is but one method open, —analysis of present experience in order to discover its essential elements."[1]

"A person touches with the forefinger a sheet of note-paper, a table-cloth, and an ink-bottle. Passing to the open air, the breeze plays on his face, he strikes his foot against a stone, and is jostled by a passer-by. The facts brought under notice are these: simple sensation, succession of sensations, difference of sensations, discrimination of sensations, discrimination of things, or knowledge of external reality by means of sensation. *Each sensation is a distinct fact of experience, dependent on a single separate action or vibration of the nerve-fibre.* The fibre must have accomplished its functional action in one case before it is capable of performing another like action. If we try to hurry the actions of the fibre, we lose distinctness. *There is thus entire separateness of action in the organism; the union is in our experience, and*

[1] J. S. Mill, Ex. Hamilton's Philosophy, p. 171.

nowhere else. The successive sensations, united in experience, are, however, distinguished by us, and that not merely as facts following each other in a certain order, but as forms of experience differing from each other in nature. Nay, more; not only are the feelings distinguished, but so also are the things or objects by contact with which the sensations arise; the nerve movements are not distinguished by us, because they are not experienced. But all these other features belong to the experience described by simple enumeration of the six different sensations involved in the experiment now under consideration. A philosophy of human sensations must then be a philosophy of all these elements of experience."[1] As the elements of our experience are dependent upon sensations, it inevitably follows that if our organs of sense are diseased or disordered, the respective sensations will be defective or distorted, consequent upon the disease or disorder of the medium of transmission. If the optic nerve, for instance, is diseased, the *true* representation of the object will not be conveyed to the sensorium. Nay, it is not necessary for the nerve of any of the senses to be *diseased;* a slight *disorder* consequent

[1] Calderwood, Relations of Mind and Brain, p. 215.

upon disease of other organs will materially change or modify the sensations.

> "All seems infected that the infected spy,
> As all looks yellow to the jaundiced eye."

To offer proof of that which can so readily be verified by observation is unnecessary. Such modifications are of every-day occurrence in the lives of physicians, and every person who has with any care noted his own feelings cannot have failed to observe the different appearances of the same scene, dependent wholly upon his surroundings, his associations, or even upon the condition of his liver, stomach, or bowels.

It is, then, indispensably necessary to a true representation of the object in the sensorium, that the organs of transmission should be in health. From the primary impression on the terminal branches of the nerves of sensation, through all the degrees of progress, as sensation, ideation, and volitional impulse, to the external manifestation of these mental operations, *the physical media must be healthy if the manifestations are normal,* and *vice versa, if the media are diseased or disordered; pari passu, the manifestations of the mind's operations will be abnormal, disordered,* some of which disordered mental manifesta-

tions are called *diseases of the mind,—insanity*, when in reality they are the result of diseased or disordered physical media, while the mind, as far as we know (assuming for it an existence as a distinct entity), is not the subject of disease.

If the mind can be diseased, then, if the disease be sufficiently prolonged and intensified, THE MIND MUST DIE. Having no direct or primary proof of the existence of mind, it must be considered in the light of the secondary evidence furnished by the manifestation of its operations through *physical media.*

§ 15. On what theory, or even hypothesis, other than that of *diseased physical media*, can the medication of the insane be otherwise than irrational and absurd? What do physicians know of the constitution of mind, on the assumption that it is a distinct entity, and subject to disease? Or what do physicians know of the therapeutic action of *material* remedies on an *immaterial* mind? The idea of curing a diseased incorporeal intangible entity by the use of material remedies is so utterly absurd that it is difficult to suppose a man sane who entertains it. But on the theory that the disordered mental manifestations are the result of diseased physical media, the exhibition of material remedies to cure material disease is rational

and proper, and if, by the administration of suitable remedies, disease is removed from the media, then the manifestations of the mind's operations again become normal and natural, and it is notorious that such is the effect of medical treatment in many cases of insanity. When a case of insanity is cured by medical treatment it is obvious that *physical*, not *mental*, disease has been beneficially treated, and therefore those cases which are so cured were *unquestionably* cases of insanity due to physical causes; *id est*, "diseased media." Had the sage who centuries ago wrote "*mens sana in corpore sano*" that idea in his mind?

§ 16. Regarding the mind as a distinct entity, a unit, indivisible and indestructible, according to the metaphysical or psychical theory, what evidence is there afforded of its being subject to disease? What is disease? Dr. Samuel Johnson's admirable definition is, "That which causes destruction by disintegration of the elements of its contexture or the resolution of its parts." Applied to the mind it would be nonsense, because that cannot be disintegrated which has no parts, nor can there be a "resolution of its parts" of that which is a unit; neither can there be "destruction by disintegration" of that which is indivisible.

It may, however, be urged by those who believe in a "diseased mind" that the incorporeal is affected differently by disease—is not subject to the same laws of health and disease as the corporeal; granted that it may be so, we do not know. Will they furnish the *modus operandi* of that disease? All ideas of disease not deduced from what we know of disease in nature must be speculative, vague, and unreal, altogether too uncertain to be made the basis of any hypothesis of practical jurisprudence. Again, if the mind is a unit, indivisible, how can partial insanity, or insanity with regard to one or more classes of subjects, while at the same time the person is sane on other subjects, be explained? And that condition unquestionably exists. Dr. Luys says:[1] "Thus, in the cases to which we allude, the perceptive regions of the *sensorium*—those in which the manifestations of conscious personality take place, are sometimes spared, and in a condition of complete integrity, while the neighboring regions are invaded by different kinds of morbid processes; and then we witness a strange phenomenon—a sort of duplication of the mental unity. The individual—thus divided into two parts—one portion of himself remain-

[1] Luys, The Brain and its Functions, pp. 207–8.

ing healthy, while the other is at the mercy of the phenomena of automatic involuntary impulse—looks on, as *a conscious spectator*, at certain extravagant acts that he is forced to commit, at certain senseless words that he utters. He is in a manner reduced to the painful position of the tetanic patient, who at the moment of the attack sees his muscles escape from the influence of his will, contract under the influence of the cells of the spinal cord, in a paroxysm of automatic, irresistible activity, and thus become unwieldable instruments which cease to belong to him. The annals of mental disease include numerous examples of this state of dissociation of the vital forces of cerebral activity. There are patients sometimes who write and describe their distresses—the involuntary agonies through which they pass, the words they have pronounced unwittingly; how they are impelled to speak in spite of themselves, to say what they would not have wished to say, to go through ridiculous gesticulations, and to commit extravagancies they believe themselves incapable of restraining. . . . These strange phenomena, these general or partial deliriums, these strange impulses of which we see abortive specimens in certain pregnant women, constitute, in the form of suicidal or homicidal impulses the essential

morbid elements, and in a manner the primary factors of mental pathology."

It is a well-established fact that very many insane persons reason with force and clearness on some subjects, while on other subjects, at the same time, they are extravagantly irrational. In general mania the central brain functions are usually exalted, and reasoning is, for the individual, unusually forcible; and when the conclusion reached is incorrect, it is from the incorrectness of the assumption rather than from lack of logic in the argument. This condition cannot be satisfactorily accounted for on the psychological or metaphysical theory, because, if the mind is a unit, indivisible, it must all be healthy or all diseased, either all rational or all irrational. We cannot think of a unit being partly healthy and partly diseased; if it were so, there would be at least two parts, the healthy and the diseased.

It has been alleged, however, that insanity itself is *primâ facie* evidence of diseased mind. Granted; but *primâ facie* evidence is not *conclusive proof.* In past ages, when medical and allied subjects were not submitted to severe scientific criticism, it is not surprising that, judging from appearances, insanity should have been believed to be a disease of the

mind; but close scrutiny has shown that the appearances were illusory; and it may be remarked that prominent among the reasons which led to a close examination of the subject were the two to which reference has already been made—viz., the irrationality of medicating lunatics on, and the impossibility of reconciling partial insanity with, that theory of insanity.

In the preceding pages indirect evidence of the "physical media" theory has been offered, showing its reasonableness, its ability to harmonize the contradictions, and to render the impossibilities of the metaphysical theory legitimate sequences.

We shall now proceed to the consideration of the direct and positive evidence by which the "physical media theory" will be fully established.

§ 17. Prof. Bain, who is not in accord with somatists, says,[1] "The facts showing that the connection of mind and body is not occasional or partial, but thorough-going and complete, are such as the following: In the first place, it has been noted in all ages and countries that the feelings possess a natural language or expression; so constant are the appearances

[1] Mind and Body, p. 6.

characterizing the different classes of emotions that we regard them as a part of the emotions themselves. The smile of joy, the puckered features in pain, the stare of astonishment, the quivering of fear, the tones and glance of tenderness, the frown of anger, are united in seemingly inseparable association with the states of feeling that they indicate. If a feeling arises without its appropriate sign or accompaniment, we account for the failure either by voluntary suppression or by the faintness of the excitement, there being a certain degree of intensity requisite to affect the bodily organs. On this uniformity of connection between feelings and their bodily expression depends our knowledge of each other's mind and character, . . . and we can even estimate in any given case the degree of the feeling."

"In the artistic conceptions of the Middle Ages, more especially, the most divine attributes of the immaterial soul had their counterpart in the material body; the martyr, the saint, the blessed Virgin, the Saviour himself, manifested their glorious nature by the sympathetic movements of their mortal framework. So far as concerns the entire compass of our feelings or emotions, *it is the universal testimony of mankind that these have no independent spiritual*

subsistence, but are in every case embodied in our fleshly form."[1] Strange as it may appear, the facts above stated, strong and convincing as they are, have been usually unnoticed in the almost endless discussions regarding the mind. Apparent as they are to the common mind, and intently studied as they have been by artists and poets, they have been disregarded both by metaphysicians and by theologians when engaged in defining the boundaries of body and mind. "Now the facts that connect the mind with the brain are numerous and irresistible. Let us rehearse a few of them under the two aspects already stated,—brain changes affecting the mind, mental changes affecting the brain. Under the first topic the commonest observation is the effect of a blow on the head, which suspends for the time consciousness and thought; at a certain pitch of severity it produces a permanent injury of the faculties, impairing the memory, or occasioning some form of mental derangement. It may also *remedy* derangement; there are cases on record where a blow on the head has cured idiocy. . . . Many instances of imbecility of mind are distinctly traced to causes affecting the nutrition of the brain.

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[1] Bain, Mind and Body, p. 8. (The *italics* are mine.—*Author.*)

"The more careful and studied observations of physiologists *have shown beyond question that the brain as a whole is indispensable to thought, to feeling, and to volition;*[1] while they have further discriminated the functions of its different parts."[2]

§ 18. Were this work intended only for physicians, it would be superfluous to refer to such evidence as they have in every-day practice of the effects of mental impressions on the physical organs and their functions in disease and health, and, *per contra*, the effect produced on the mind by the different conditions of the body. Such as the well-known fact that a sudden severe mental shock will for a time arrest digestion and remove the desire for food in persons who just before the shock were suffering from hunger; the inability of some persons to retain certain medicines *if they know that they have been administered*, while if the medicine is taken unwittingly, no discomfort is experienced; the expectation of a chill to return at stated intervals; the exalted mental condition almost pathognomonic of general paresis, or the almost total loss of the power of thought; and the dull, heavy,

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[1] The *italics* are mine.—*Author.*

[2] Bain, Mind and Body, pp. 12, 13.

absent, puzzled expression of the features, which indicate with certainty the presence of typhus fever. The list might be extended indefinitely. Not only is the mind *influenced* by the physical condition, but in many diseases and disorders it is *entirely subordinated*. In severe cases of our ordinary fevers there are the insane ravings, delirium, etc., which mark the loss of control of reason and judgment, and so well known are these symptoms that, given a certain fever, the physician will tell you the character of the mental aberrations,—the boisterous ravings of the sthenic, and the low, muttering delirium of asthenic fevers. In inflammation of the brain or of its meninges the wild delirium is so well understood, even by non-professional people, that any physician would be esteemed almost, if not quite, a lunatic who should advise such a patient to be sent to an insane asylum; common observation having taught them that the insane ravings and delirium were the result of the inflammation, and that as soon as the *cause*, the inflammation, was removed, the *effect*, the insane ravings, would cease.

In the absence of *generally known causes*, most people would pronounce the raving, delirious persons insane, and treat them accordingly, simply because

the symptoms of fever and inflammation respectively were absent, and *there was no physical cause present which the non-professional observer could detect or understand.* It does not follow, however, because the physical cause of the mental disorder has eluded the observation of the unskilled, that it does not exist, or that it would not be readily recognized by an expert, as it is well known that many differential indications, too subtile for the non-professional eye, guide with unerring certainty the expert in determining the exact nature of disease. That fevers and inflammations during certain stages of those diseases subordinate the mind, producing insane ravings and maniacal delusions, is a fact established beyond question. No person thinks of the delirium of fever as evidence of insanity, experience for thousands of years having taught that with the abatement of the fever there will be a return of the reason; hence the lesson taught by those diseases is of the highest importance in studying the nature of insanity, showing conclusively as it does, that at least *some forms of mental alienation are the result of purely physical causes;* and, it being established that even a single class of mental derangements is the result of physical and not mental disease, it necessarily follows that all

others may be and are likely to be similarly produced, unless they can be accounted for more rationally by some other established theory, and *that more rational theory is wanting*. But strong as is the presumption, from what we know of *some*, that *all* forms of mental aberration are the result of physical disease or disorder, "*ab uno disce omnes*," yet we do not rest the case upon that evidence alone. It may be claimed by some that the insane ravings and delirium of fevers are different from similar insane ravings and delirium which they allege to be evidence of diseased mind, because the other indications of fever are wanting; if so, to them we leave the task of explaining what has never yet been explained—viz., in what the difference consists, and *how the increased temperature and other physical symptoms of fever* affect that *incorporeal entity*, the mind.

§ 19. Disease has been shown to furnish strong proof of the physical origin of insanity; but the evidence from our remedies for disease is still stronger, because by the use of certain drugs known to the profession as *deliriants*, such as alcohol, opium and its alkaloids, hyoscyamus, haschisch, etc., we can at will produce the maudlin imbecility, the hallucinations, the boisterous maniacal ravings, and the wildest delirium,

the complete subordination of reason and judgment; and not only can these mental phenomena be produced at will, and continued at pleasure, by the exhibition of one or more of the deliriants, but the abnormal mental manifestations may also be controlled at will *by the administration of the antidote to the drug used*, while long-continued habitual use of deliriants invariably results in the impairment of the mental faculties; of which fact we have, unfortunately, proof too abundant and convincing in the persons of drunkards and opium-eaters. Again we ask, "Will any sane person affirm that the *material drugs* directly affect the *incorporeal, immaterial mind?*" If so, to such persons we leave the task of explaining the therapeutic action of deliriants.

§ 20. Having referred to some of the evidences furnished by disease and by drugs of the physical causes of insanity, the dead will now be interrogated. *Many forms of insanity can now be at once recognized by the expert on post-mortem examination of the nerve-centres of a deceased insane person.* It is not generally claimed that the pathological condition of every case in all forms of insanity could now be confidently predicated. It should be borne in mind that systematic investigation of the post-mortem evi-

dences of insanity is yet comparatively in its infancy. Bucknill and Tuke say,[1] "It is only since the first edition of this Manual was published, fifteen years ago, that the old belief in the spiritual nature of Insanity has utterly died out. It is only within this recent period that trustworthy observations have been made on the morbid histology of the brain, and even now [1874] next to nothing is known of its chemical pathology. But . . . if the authors should live to issue another edition, they confidently hope to record that the veil of ignorance has been rent in many directions, and that the genesis of mind and its diseases is no longer perceived as a general fact, but in its detail as a great and growing science." And the same eminent authors have admirably portrayed the difficulties in the way of such investigation, many of which, however, by patient labor and indefatigable energy, have already been overcome. They say,[2] "The difficulties arising out of the peculiarly delicate structure of the brain, which for so long stood in the way of the anatomist, preventing him from arriving at a definite knowledge of the histology of the organ, were of necessity even greater stumbling-blocks in the path of

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[1] Psychological Medicine, 3d ed., p. 610. [2] Ibid., p. 612.

the pathologist. The double-bladed knife of Valentine, which had aided in the elucidation of the healthy and unhealthy conditions of other organs of the body, failed in producing sections of brain sufficiently thin for submission to the microscope, and it was not until chemical agency was employed that any accuracy was obtained in our knowledge of the relations of its complex elements. As soon, however, as it was discovered that chemical solutions could be employed, which, whilst hardening the nervous tissue, did not interfere with its relative structure, a host of observers broke ground in this yet untrodden field of anatomical research. In Germany the researches of Arndt, Jacubowitsch, Meynert, Bischoff, Stilling, Schroeder van der Kolk, Kölliker, and others have served to place the anatomy of the brain on almost as definite a footing as that of any other organ of the body, whilst in England the splendid demonstrations of Lockhart Clarke stand pre-eminent. The pathologist soon followed in the track of the anatomist, and although it cannot be said that his results have been so immediately brilliant, it cannot be denied that he has done most important work, which must, when further prosecuted, react on physiology and anatomy."

"The thorough performance of a post-mortem ex-

amination of a case of nervous disease is a long and arduous task; we can no longer depend on the pound weight, the foot rule, or the naked eye as guides to a knowledge of the condition of the unhealthy brain, and unless the microscope is brought into play the autopsy must be considered imperfect."[1]

While some of the difficulties attendant upon the minute examination of the brain and spinal cord have thus been suggested, there are many very grave ones that have not even been hinted at, known only to those who have themselves made systematic investigations of the subject, or who have carefully followed the reports of those who have. To afford a faint idea of the painstaking care, the varied scientific aids, the delicacy of manipulation, the unwearied patience, and the indomitable perseverance required in the investigations, in order that the utmost accuracy might be obtained, we quote from the recent work (American reprint, 1882) of Dr. Luys, Physician to the Hospice de la Salpétrière, which quotation reports but a small portion of the difficulties overcome and the labor which he actually performed. Speaking of the method he employed for studying the

[1] Psychological Medicine, 3d ed., p. 613.

brain and spinal cord, he says,[1] "It essentially consists in the preparation of a series of sections made methodically, millimetre by millimetre, vertically, horizontally, and antero-posteriorly; and these sections being thus made according to the three dimensions of the solid mass which was to be studied,—in reproducing them photographically, I set myself, then, to make a series of successive horizontal sections of the brain, previously hardened in a chromic acid solution, from apex to base, at intervals of about one millimetre,[2] as perfect as possible; each being in its turn reproduced by photography. I made similar sections of the brain in a vertical and antero-posterior direction, and at regular intervals from behind forwards. These operations having been thus regularly conducted, this method enabled me to have representations of the reality as exact as possible; to keep the natural relations of the most delicate portions of the nervous centres each by each according to their normal connections, and, in fact, without deranging anything. Thus, by comparing the sections, horizontal or vertical, one with another, I could follow a given order of nerve-

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[1] The Brain and its Functions, Luys, pp. 6, 7, 8.

[2] = .03937 of an inch.

fibres in its progress, see its point of origin and its point of termination, study the natural increase in complexity of the different kinds of nerve-fibrils, millimetre by millimetre, changing nothing, lacerating nothing, and leaving everything pretty much in its normal position. By means of these new photographic methods of reproduction" (previously described), "which are all the more precise because impersonal, I had only, then, to register the details the sun himself had printed, to place the prints in juxtaposition, to compare them one with another, and thus to make a single synthesis of the multiple elements of analysis I had thus obtained by the automatic co-operation of the light. The general view of cerebral topography having thus been fixed by these processes, the regions of more delicate texture, the special points which it was necessary to study in their minute elements, were further sufficiently magnified and reproduced, with successively increasing powers. I could thus render visible to the naked eye, and exhibit on a plan, details of structure which up to that time had only been seen in isolation under the tube of the microscope. By this means the mind of the observer, penetrating successively from the known to the unknown, from well-defined regions to those which are not so as yet, can easily make itself

familiar with the details of the minute structure of the final nerve-elements."

The intention here is simply to direct attention to the *methods of observation*, as those researches, being of recent date, are not so commonly known as the more prominent indications of the origin of disordered mental manifestations, disease, drunkenness, etc.

The limits of this work will not permit any approach to a detailed report in the successive stages in the chain of investigation by which the conclusions have been reached, pointing out the characteristic changes which unerringly indicate that the brain belonged to an insane person, and not only the generic fact, but, with few exceptions, the *class*, as well as the *family;* therefore reference will be made to a few well-authenticated conclusions.

§ 21. Dr. Maudsley says,[1] "Let it suffice here to say that Schroeder van der Kolk could venture to assert that he *never failed to discover* morbid changes of structure in insanity, and that, when intellectual disorder especially had existed he had found the cortical layers under the frontal bones to be darker

[1] Physiology of Mind, p. 124.

colored, more firmly connected with the pia mater, or softened; in melancholia, on the other hand, where the feelings mainly were excited or depressed, the pathological changes were found principally in the convolutions of the upper and hind lobes. In old age, when the memory fails, he found the cells of the cortical layers visibly atrophied."

Professor Bain, who, as before stated, is not in accord with the somatic theory, says,[1] "The association of brain-derangement with mind-derangement is all but a perfectly-established induction. In the great mass of insane patients the alteration of the brain is visible and pronounced. I may quote as evidence on this head a pamphlet by Drs. J. B. Tuke and Rutherford 'On the Morbid Appearances met with in the Brains of Thirty Insane Persons.' The brains examined were those of patients whose deaths occurred consecutively, and were in no way picked on account of any peculiarity. The forms of disease exemplified were general paralysis, dementia with paralysis, chronic dementia, epileptic insanity. *In every case there was noticed a marked departure in one form or another from the healthy structure of the brain.*

[1] Bain, Mind and Body, p. 14.

The authors enumerate nine species of morbid changes discovered by microscopical examination. The occurrence of a case that presented no visible derangement would not be a conclusive exception, inasmuch as there may be alterations of substance that are not visible. It is believed, however, that in all cases of pronounced mental aberration disease of the brain is present in a marked form."

That recent research in the pathology of the nerve-centres is of great importance, and that among other uses it has furnished strong proof of the physical cause of insanity, cannot be denied; and we think there is little hazarded in predicting that in the near future the classification of the pathological conditions on which every form of insanity depends will be as complete and as well known to experts as are now the indications of the various diseases of the kidneys, and by the same agencies, chemistry and the microscope.

But in "interrogating the dead," to have evidence of a most conclusive character we are under no necessity whatever to use obscure, partial derangements of the brain, however strong the proof may be that is furnished by them, as, *if an adult human brain weighs less than thirty ounces, it is primâ facie evidence that*

the person was an imbecile.[1] *To this rule, we believe, there has been no exception observed.*[2]

The average weight of a male (European) brain is about forty-nine and one-half ounces, that of females about forty-four ounces, while the maximum we believe is sixty-four and one-half ounces (that of Baron Cuvier). Daniel Webster's was fifty-three and one-half ounces, while the minimum, those of imbeciles, range from thirty ounces to eight and one-half ounces. To have a little less than half the weight of Cuvier's, or a little more than half the weight of Webster's brains, is to be hopelessly an imbecile. Mark the astounding difference, the immeasurable distance, between the intellectual power of a Cuvier or a Webster and the total lack of intellectual power of an imbecile, and the only reason for the difference of which we have any knowledge is the lack of a few ounces of brain! It matters not that the cerebral light-weight grows and develops physically; that his vocal cords are in order—he can speak; that his senses are all

[1] Turner's Anatomy, vol. i. p. 298.

[2] The nearest approach to an exception is the marvellous case reported by Professor Cardona, that of Antonia Grandoni, who died at the age of forty-two years, whose brain weighed only two hundred and eighty-nine grammes (a little more than nine ounces), and yet in her lifetime she exhibited some mental power.

present; if his brain weighs less than thirty ounces, intellectual growth or development is impossible. It will be observed that whether the maximum brain of the imbecile is thirty, or, three ounces, would not at all affect the argument, if it be granted that there is a fixed weight, below which there can be no intellectual ability. Will those who hold that the mind is superior to, and wholly independent of, the body, that the body is an "incumbrance," a "clog," a "hindrance," to its empyrean soaring, please explain what possible difference it can make whether that body, of which it is entirely independent, has six ounces or sixty ounces of a merely *material* substance called the brain?

§ 22. Many of the ablest psychologists of the day admit that the brain is the organ of mind, that the mind operates only through physical media. Professor Calderwood, one of the most astute and determined opponents of the somatic theory, in his work written expressly to refute the materialistic theory of mind, says,[1] "We have come even systematically to speak of 'mental diseases' and their treatment, as if the phrase were the appropriate designation in the circumstances. Yet it is singularly inappropriate, ex-

[1] Relations of Mind and Brain (London, 1879), p. 363.

cept in the vocabulary of those with whom brain disorder and disorder of mind are synonymous. The closeness of relation between mind and brain—the admitted fact that disturbance of the one, as a rule, involves disturbance of the other—may sufficiently account for conventional usage. But the power of conventionalism is the only explanation of the persistence of the phrase 'mental diseases' *to describe a class of disorders as truly physical as disorders of the eye or ear.*"

The same author quotes approvingly Dr. Ferrier's statement,[1] "That the brain is the organ of mind no one doubts; and that, when mental aberrations, of whatever nature, are manifested, the brain is diseased organically or functionally, we take as an axiom." The same distinguished writer gives the post-mortem evidences in five cases, and draws the following conclusions:[2] "These five cases may be taken as marked illustrations of the condition of brain in persons said to be suffering under *mental derangement.* Disease has been established in that organ" (the brain) "by means of which alone it is possible for the mind to control and govern bodily actions and tendencies." Again,[3] "The sufferer under delusion

[1] Relations of Mind and Brain (London, 1879), p. 364.
[2] Ibid., p. 378. [3] Ibid., p. 385.

reasons accurately on the suppositions adopted by him to account for his experience. No one would propose to deal argumentatively with his case. His whole intellectual process is in harmony with intellectual law as recognized and applied by others; the delusion is a product of brain state, and can be influenced or removed only by medical treatment." Many other authorities might be quoted to prove the pathological character of the so-called diseases of the mind by post-mortem evidence, but we think those already referred to sufficient; and more of the same import would probably fail to satisfy those, if any, who are yet unconvinced.

Let it, however, be assumed that there may be a few cases of insanity which could not at present be detected by post-mortem examination, that would not necessarily show the proposition to be untrustworthy, —viz., that *insanity is a disease physical in its origin and character*,—but instead would show our lack of investigating ability. There are a few causes of death unconnected with insanity that leave no morbid anatomy, so far as the pathologist has yet been able to discover,—no post-mortem evidence which would account for the loss of life. In those cases, which would be the more reasonable conclusion, that the person

did not die of any disease, or, that disease had been present, but its traces were so faint as to elude our powers of detection?

§ 23. We think sufficient evidence has already been educed to show that insanity is a physical, not a mental, disease, and yet THE proof *par excellence* remains to be offered. We have taken considerable trouble to acquaint ourselves with the facts, and we believe *that there is not an Alienist in the United States who believes that insanity is a disease of the mind.* The medical superintendents of asylums for the insane, so admirably prepared by education and professional knowledge, and from the large numbers of insane persons under their care, having the best possible opportunities for the study of their specialty, both theoretically and practically, ought to be considered as speaking *ex cathedrâ* on the question. If they do not know all that is to be known, they do *know all that is known of the subject*, and therefore *their united testimony ought to be regarded as conclusive.* These gentlemen all believe insanity to be physical, not mental, disease, and depend largely upon the judicious administration of *material remedies* for the cure of the insane. If any evidence were wanting to show the fact that the superintendents of asylums for

the insane are believed to have a superior special knowledge of insanity, we know of no stronger practical proof than the fact that there are such State Asylums; and that those gentlemen are the superintendents thereof. The present is an eminently practical age, consequently not disposed to take much trouble, or to expend much treasure on speculative, abstract hypotheses. What are the facts regarding insane asylums? Are the millions of dollars spent on their erection and equipment and the large annual outlay for their maintenance evidences of reckless folly on the part of the several States, or are they the highest evidences of enlightenment of a humane people in their rational care of, and provision for, a sorely afflicted class of citizens? The confidence with which all classes regard the asylums as places where the insane will receive the best care and the most scientific professional treatment from the medical superintendents and their assistants, together with the large sums voted year after year for their support, proves at once the beneficence of such institutions, and furnishes the strongest practical proof of the high estimation in which medical superintendents of insane asylums, as a class in their specialty, are held by the people.

§ 24. It may be urged that while strong proof has

been offered in support of the theory that the *mind* is not diseased in the insane, yet the proof has not amounted to a positive demonstration. That objection is admitted; as we believe a demonstration in the premises to be impossible, because it implies proving a negative, of the subject of which proposition we have not and cannot have any *primary* evidence. It is not, however, always necessary to demonstrate a proposition before we can accept it as true. A proposition must be accepted as true *when the mind cannot conceive of its negation by facts or science.* It may not be susceptible, from its very nature, of demonstration, and yet be an admitted truth to our consciousness. We cannot demonstrate the existence of the chemical atom, yet we firmly believe the atomic theory based upon it. We cannot demonstrate the origin of either matter or mind, nor what they are, and yet a man would be accounted insane who should deny the existence of either; in fact, the propositions which can be demonstrated are few indeed, compared to our beliefs. All men accept many such undemonstrable, but nevertheless irrefutable, truths, and we respectfully submit that the proofs offered, showing that insanity is not a disease of the mind, could not be stronger, unless by absolute demonstration.

It has been shown from the physical evidence of the feelings and emotions; from the effects of fevers and inflammations on the mind; from the effects of medicines given, in producing and preventing insane delusions and maniacal ravings; from the effect of material remedies on, and their power in curing, some forms of pronounced insanity; from post-mortem evidences; from the impossibility of reconciling partial insanity; and from the unanimous opinion of alienists, *that the psychical or metaphysical theory of insanity cannot be maintained; and from such showing we claim that the "physical media theory" has been fully established,* and the following is offered as a definition of insanity: A DISEASED OR DISORDERED CONDITION, OR MALFORMATION, OF THE PHYSICAL ORGANS THROUGH WHICH THE MIND RECEIVES IMPRESSIONS, OR MANIFESTS ITS OPERATIONS, BY WHICH THE WILL AND JUDGMENT ARE IMPAIRED, AND THE CONDUCT RENDERED IRRATIONAL. And as a corollary we offer: *Insanity being the result of physical disease,* IT IS A MATTER OF FACT *to be determined by medical experts,* NOT A MATTER OF LAW *to be decided by legal tests and maxims.*

CHAPTER III.

THE SOMATIC THEORY.

In considering Insanity a Physical Disease the "Somatic and Physical Media Theories" are in Accord—Important Points of Difference between the Theories—Mind not necessarily a Brain Function, because it is obliged to use the Brain in its Manifestations—Which is Precedent and which Consequent—Somatists deny the Existence of Free Will—Heredity determines irresistibly the Character—Cannot even will against it—There can be no Crime where there is no Free Will—If the Effect of Hereditary Neuroses, Crime is not Guilt to the Perpetrator—Heredity considered—Efforts to obtain Trustworthy Data—Heredity supported by the "Evolution Theory"—Evolution Theory defective—Defects considered—Physical Development of Thought Hypothesis examined—Scientific Demonstrations not always Trustworthy—Conclusions reached.

§ 25. The "somatic theory" will now be briefly discussed; briefly, not because it is intrinsically unworthy of consideration at greater length, but because, like the "physical media theory," it treats insanity as a physical disease; hence in that most important respect, in their "medico-legal relations," there is no *practical* difference between them. In following the two theories, however, to their ultimate conclusions, there are differences, and some of the more important of them, chiefly the "freedom of the will" and "moral

insanity," will be considered, as those questions directly and most importantly affect the jurisprudence of insanity.

§ 26. It does not necessarily follow because the mind is indebted to the body for the media of manifesting its operations, whether the manifestations are normal or abnormal, that the mind must therefore be a product or function of the body, or of any part of it.

Granted that cerebral disintegration is as much a condition of mental manifestations as muscular decay is of muscular contraction; that does not determine which is the *precedent* and which the *consequent;* does not, in other words, determine whether the cerebral disintegration is the *cause*, the *accompaniment*, or the *effect* of the mental manifestations, or, from the fact of its intimate association with matter, does not prove that "mind is a function of matter," or that "matter is a realization of mind."

The products of retrograde metamorphosis or cerebral disintegration, are lactic acid, kreatin, uric acid, hypoxanthin, formic and acetic acids. These material products are not the constituents or attributes of mind, and therefore do not, as an analysis, prove that nerve change precedes mental action.

Regarding mind as a function of the brain neces-

sarily precludes the possibility of an *independent will.* In the following discussion of the will, reference will be made almost exclusively to the works of Dr. Maudsley, whom we regard as the best exponent of the somatic view of that subject, as well as the ablest writer of the age on psycho-physiology. He says,[1] "The history of a man is plainly the truest revelation of his character, for what he has done indicates what he has willed; what he has willed marks what he has thought and felt, or the character of his deliberations and feelings; what he has thought and felt has been the result of his nature then existing as the developmental product of a certain original construction and a definite life experience. . . . The fashioning of the will is the fashioning of the character, and this can only be done indirectly by fashioning the circumstances which determine the manner of its formation. But however formed, it is the character which determines what the inclination shall prompt as most desirable, the judgment decide to be most eligible, and the will carry into effect. If it were possible for any one to enter thoroughly into the inmost character of another person, and to become

[1] Physiology of Mind, p. 449.

exactly acquainted with the moving springs of his conduct in his particular relations of life, it would be possible not only to predict his line of action on every occasion, but even to work him, *free will notwithstanding, like an automaton,* by playing on his predominant passions, interests, or principles."

Again:[1] "There is a destiny made for a man by his ancestors, and no one can elude, *were he able to attempt it, the tyranny of his organization.*"

Again:[2] "At the end of all the most subtile and elaborate disquisitions concerning moral freedom and responsibility, the stern fact remains that the inheritance of a man's descent weighs on him through life as a good or a bad fate. How can he escape from his ancestors? Stored up mysteriously in the nature which they transmit to him, he inherits not only the organized results of the acquisitions and evolution of generations of men, but he inherits also certain individual peculiarities or proclivities which *determine irresistibly the general aim of his career.* While he fancies that he is steering himself, and determining his course at will, *his character is his destiny.*[3] The laws

[1] Maudsley, Responsibility in Mental Diseases, p. 22.

[2] Maudsley, Body and Mind, pp. 164–65.

[3] The *italics* in the above quotations are mine.—*Author.*

of hereditary transmission are charged with the destinies of mankind—of the race, and of the individual."

§ 27. To what practical conclusion does this doctrine tend, if not to absolute irresponsibility? If it is true that a man has no free will, no ability to "steer himself or determine his course," is not even able to *attempt* to elude the "tyranny of his organization," is "wrought like an automaton" by a force that he cannot even attempt to control, then he cannot commit any crime; be he sane or insane, he is irresponsible for his every act, because no man can be held responsible, either morally or legally, for any act or deed perpetrated which he was wholly unable to prevent. There can be no crime in any act done which is the result of an all-powerful coercion. Responsibility for, presupposes ability to avoid committing, the crime. It may be true in a general sense that "There's a divinity that shapes our ends," but in the same general sense it is quite as true that "every man is the architect of his own fortune," that man both modifies and is modified by his organization. If a person has no "free will," by which he is able to choose the good and reject the evil; if his choice is predetermined for him by "hereditary transmission of character," or by any other irresistible force, which for the individual

"*is his destiny*," then the irresistible force or the destiny, not the individual, is responsible. If the coercion is absolute, the kind of force employed is unimportant; it is also immaterial whether the coercion is from within or from without—whether the coercing power is the irresistible strength of a giant guiding and impelling the hand and dagger, or the equally irresistible force of hereditary taint; which, for the individual is said to constitute his destiny, against the power of which he is unable even to attempt resistance; in either case (if the latter is admitted) the irresponsibility must be as absolute as the coercing power.

Should the doctrine ever be generally believed that our "free will" is entirely subordinated to our characters hereditarily transmitted to us, which character is to each individual a destiny, against which he cannot even attempt resistance, then our jails and State prisons should be changed to hospitals, and instead of thinking or speaking of the commission of crimes, and the punishment of the perpetrators, criminal acts will be considered as symptoms of a disease called criminal neurosis; our courts of justice will have to be abolished, as instead of being tried and punished for dishonesty or crime, the person would be sent to

the hospital for incurables, suffering from the grievous disease known to the profession of that day as "hereditarily transmitted dishonest or criminal character." These conclusions appear to approach the *reductio ad absurdum*, and yet we claim for the deductions that they are legitimate; that if the *premises be granted*, the conclusion is inevitable.

§ 28. The important question is here forced upon us, "Is it really true that the character and destiny of every person is irrevocably made for him by his ancestors?" Has that proposition ever been demonstrated, or, if undemonstrable, has such proof been offered that the "mind cannot think of its negation by facts or science"? Neither of these questions can be answered in the affirmative.

That there is hereditary transmission *to some extent* all physiologists and pathologists admit, but the point of limitation is an open question. The great body of physiological observers, however, and among them some of the ablest and most earnest workers, do not claim for it any such limitless power over character and conduct. In the extreme views under consideration the dominating influence of heredity is, we think, vastly overrated, while its correctives—association, education, and training—are either quite ignored, or

as much underrated; and the facts, as far as we have been able to collate them from foundling hospitals and kindred institutions, prove the correctness of our opinion. It is much to be regretted that fuller records are not kept of the *parentage* and *character in after-life* of the waifs and foundlings that receive care, instruction, and training in children's hospitals and juvenile reformatories, as such carefully kept records would go far to settle the vexed question of how far proper surroundings, education, and moral training will counteract an hereditarily vicious disposition; and we confidently expected to present here tabulated returns of the after-lives of all classes of parentage, good, bad, and indifferent, from a sufficient number of "homes," "orphan asylums," "foundling hospitals," etc., that at least an approximate reliability might have been secured as to the power of education and moral influence in infancy and youth to correct ancestral tendency to vice and crime, but as we have not yet received a sufficiently large number of *fully authenticated* cases to warrant our drawing positive conclusions from them, we have decided to postpone the tabulation for the present. There are, unfortunately, comparatively few among the benevolent societies and institutions for the care of foundlings,

orphans, etc., that keep their records with sufficient accuracy and fulness to furnish trustworthy information of the kind required, while many, some of them very extensive ones, such as that under the care of the Rev. George Müller, of Bristol, England, have no records of the kind required at all. Many such institutions have promised to adopt such regulations as will for the future enable them to speak with certainty of the conduct of many of their wards after they shall have been removed from their guardianship (the part most deficient at present), and therefore in the not distant future we hope to be able to offer something more satisfactory than opinion against opinion on this most important subject.

§ 29. The "theory of evolution" is also largely taxed to prove the correctness of the somatic theory. The world is unquestionably largely indebted to the patient, laborious, painstaking scientific investigators who have been interrogating nature, determined on solving the problem of *evolution*. While, however, we thankfully acknowledge the advancement of science from their indefatigable exertions, and while we receive their verified facts with gratitude, we know of no reason why we should be obliged to accept their *deductions*, *assumptions*, and *speculations* as a part of

the new gospel, and of these the theory of evolution is as yet largely composed; neither are we required to accept the *theory of evolution*, nor any other theory, as proof of any proposition until that theory shall have been fully established. No attempt will be made here to consider the *theory of evolution* further than to state briefly what is claimed for it, and one or two objections from among many which, while they remain, are fatal to its being considered an established theory.

Briefly stated, the believers in the theory of evolution claim that there was a time when "the existing world lay potentially in the cosmic vapor." After the lapse of an indefinite time, protoplasm was formed, which gradually evolved the higher forms of vegetable life, and from vegetable life the lower forms of animal life, and by natural selection, or "the survival of the fittest," man, the highest form of evolutional development, came into existence.

Professor Huxley, one of the ablest and most astute champions of evolution, in his "Lay Sermons," says, "The man of science has learned to believe in justification, not by faith, but by verification." And with this opinion Professor Tyndall agrees: "Without verification a theoretic conception is a mere figment

of the intellect." Now, it will be at once seen that two of the most important dogmas of this theory, *the two pillars on which it chiefly rests*,—"SPONTANEOUS GENERATION" and "TRANSMUTATION OF SPECIES," *have neither of them been verified by facts.* These are not by any means the only missing links in the chain of evolution, but reference here will be confined to them as all that is necessary for our purpose, for *without them the theory of evolution cannot be established*, either of them being a *sine quâ non.*

Taking into account the aggressive positiveness with which many of the apostles of evolution hurl its conclusions, as if they were infallible, against all and sundry who do not espouse the new doctrine, it would hardly be supposed that for those conclusions they were so largely indebted to the hypothetical.

Let it be remembered that every conclusion, according to the theory of evolution, in which man is in any way affected is largely made up of assumptions, *many of which assumptions are wholly unsupported by facts.* Among the assumptions embraced in every conclusion there must be (1) that at some period of the world's history, we know not when, and by some process, we know not what, dead matter became living matter; (2) that at times and by processes equally unknown,

there was "transmutation of species"; and (3) that many missing links in the species-chain now extinct, once existed; but without a shadow of proof of such existence, geology being profoundly silent on the subject. These must all be shown, *because all are included in man's origin according to evolution.*

§ 30. Assumptions of the same character, and ingenious speculations conspicuous for their lack of verification, are also observable in the processes accounting for the physical origin of thought, judgment, will, etc. Referring to it, Mr. Lewes says,[1] "Let me only warn the reader who has to rely on second-hand instruction that the assignment of even Thinking to the cerebral hemispheres is purely hypothetical. Whatever may be the evidence on which it rests, it must still be acknowledged to be an hypothesis awaiting verification. This may seem incredible to some readers accustomed to expositions which do not suggest a doubt—expositions where the course of an impression is described from the sensitive surface, along the sensory nerve to its ganglion, from thence to a particular spot in the Optic Thalamus (where the impression is said to become a sensation); from that spot to cells in the

[1] Problems of Life and Mind (Third Series), pp. 65–66.

upper layer of the cerebral convolutions (where the sensation becomes an idea); from thence downwards to a lower layer of cells (where the idea is changed into a volitional impulse); and from thence to the motor-ganglia in the spinal cord, where it is reflected on the motor-nerves and muscles.

"Nothing is wanting to the *precision* of this description. Everything is wanting to its *proof*. The reader might suppose that the course had been followed step by step, at least as the trajectory of a cannon-ball or the path of a planet is followed; and that where the actual observation is at fault calculation is ready to fill up the gap. Yet what is the fact? It is that not a single step of this involved process has ever been observed; the description is imaginary from beginning to end. I do not say that imagination has had no inductions to work upon, but I say that all the evidence we at present have goes no nearer than showing that the integrity of the nervous system is necessary for the manifestation of its mental phenomena; and that although specialization of function demands specialization of organ, we have not yet discovered the special parts played by particular portions of the central nervous mass."

Again, we shall be indebted to Professor Tyndall,

who says,[1] "The passage from the physics of the brain to the corresponding facts of consciousness is unthinkable. Granted that a definite thought and a definite molecular action in the brain occur simultaneously; we do not possess the intellectual organ, nor apparently any rudiment of the organ, which would enable us to pass, by a process of reasoning, from the one to the other. They appear together, but we do not know why. Were our minds and senses so expanded, strengthened, and illuminated as to enable us to see and feel the very molecules of the brain; were we capable of following all their motions, all their groupings, all their electric discharges, if such there be; and were we intimately acquainted with the corresponding states of thought and feeling, we should be as far as ever from the solution of the problem, 'How are these physical processes connected with the facts of consciousness?'"

§ 31. If scientific theories are to receive the unqualified approval and support of thinking men, it is all-important that those theories should be established by verified facts. In the "somatic" and "evolution" theories it is admitted that there are many verified facts used, and much reasoning that appears to be

[1] Fragments of Science, pp. 119–120.

irrefutable *were the premises granted*, but there is also so much taken for granted, so many facts, so called, that are not verified, and which are *essentials* in the establishment of the theories, that until those postulates give place to verifications, would it not be better, less likely to mislead, to designate them, as they are, hypotheses, instead of theories? Besides, even the demonstrations of some of our exactest sciences will sometimes mislead, unless corrected by observation, experience, and common sense. Take chemistry, for example. By it we demonstrate that diamond, plumbago, and charcoal all = C (carbon); that oils of bergamot, pepper, and valerian (and many others) all = $C_{10}H_{16}$. Now exactly the same mathematical reasoning which we use to demonstrate that the three sides of an equilateral triangle are equal, alike, identical, demonstrates that diamond, plumbago, and charcoal, being each equal to "C," are "each equal to one another," and as things that are equal to the same thing are equal to one another, therefore diamond, plumbago, and charcoal are alike, identical; and by the same process of demonstration, so are the oils of bergamot, pepper, and valerian alike, each equal to the other; and it remains for observation, experience, and common sense to correct the demonstrations of that exact science, chemis-

try; and the illustrations given by no means exhaust the list, as what is true of them is true of all *isomers* and *allotropes*. We attempt to account for the *actual* difference between isomeric bodies by supposing a different molecular arrangement, but that is simply an inference, a supposition, without any support from verified facts.

We are self-conscious that we *think*, that thought exists, but we know nothing as a matter of observation or of fact of even the existence of the *thought molecule*, if such a thing exists, on which so largely depends the theory, or rather hypothesis, of mind being a function of the brain or nerve-centres according to the "somatic theory."

Further objections might be urged from the consideration of volition, reason, and judgment, but we think our purpose already accomplished. We have no intention at present to discuss the "somatic" or any other theory otherwise than as we apprehend it may affect the *medico-legal relations of insanity*. We are not required to disprove the "somatic theory," but only to point out such important defects that it cannot be considered an *established* theory, as then, nothing can be proved by it any more than by an unverified rule. The other objection, "moral insanity," will be considered in the chapter on "Experts" (§ 69).

CHAPTER IV.

THE INTERMEDIATE THEORY.

What Messrs. Wharton and Stillé claim for it—A Theory must be established to have any Authority—Claims of the "Intermediate" to be regarded as a Theory considered—Want of Clearness and Precision of Language deprecated—Definition of "Theory" and "Hypothesis"—Designation "Intermediate" a Misnomer—Physical Origin and Growth of Mental Disease considered—System of Therapeutics—Obviation of Difficulties by "Intermediate" considered—Position assumed by Messrs. Wharton and Stillé considered—Legal Tests cannot define or determine Physical Diseases—Conclusion.

§ 32. The "intermediate theory" of Messrs. Wharton and Stillé will now be considered; in introducing which they say,[1] "To those who have examined that portion of the preceding pages which treats of the legal relation of mental unsoundness, it will be obvious that no hypothesis can be constructed which will meet with exactness every possible future case.

"No general definition has therefore been attempted, and it is sufficient at present to notice the three prominent hypotheses by which the *cause*,

[1] Med. Juris., 3d Ed., vol. i. § 318.

rather than the *nature*, of mental unsoundness has been explained. This examination is here made the more thorough, from the fact that it is upon the result of this inquiry that the philosophy of the common law doctrine of insanity must depend."

It will be readily admitted that if the "philosophy of the common law doctrine of insanity must depend" upon some *hypothesis*, or, what would be much better, upon some established *theory*, it is of the utmost importance that that hypothesis or theory should be examined with the most exacting scrutiny, so as to verify its correctness and reliability beyond peradventure.

The *psychical* and *somatic theories* are discussed, and their defects and inconsistencies very forcibly pointed out, by Messrs. Wharton and Stillé, and they conclude that both are impracticable; then they introduce the *intermediate theory*, to which they give the weight of their authority, and, while they very effectively criticise the former theories, they appear to think the enunciation of their favored theory amply sufficient, as, with the exception of a few inconclusive arguments, they have offered nothing in its support. Let it be borne in mind that a theory must be *fully established* before it can be used as authority, or as evidence in the discussion of any proposition. No

proposition can be rationally explained by a simple reference to an assumed criterion which itself requires explanation to render it intelligible, or proved by a similar reference where the criterion is unverified. Thus, the *atomic theory* may *now* be properly invoked in explanation or proof of any chemical problem, but it could not have been so used until *established as a theory* by Dalton at the beginning of the present century.

Considering the *intermediate theory* as the basis on which the "philosophy of the common law doctrine of insanity must depend," as claimed by Messrs. Wharton and Stillé, surely the vastness of the responsibility resting upon it should have induced the eminent authors to enunciate their criterion in language so clear and exact that a misapprehension of its meaning would be almost, if not quite, impossible, and to have established its trustworthiness by the strongest proofs and the most convincing arguments at their command. These are reasonable, nay, imperative, requirements, yet, incredible as it may seem, these writers of acknowledged ability have neither furnished the one, nor offered the other. The omission is so remarkable that, fearing a charge of misrepresenting them, Sections 329–337, inclusive, which is all they

offer in support of the *intermediate theory*, will be found below.[1]

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[1] Intermediate Theory. *Its Basis.*

§ 329. This view attributes to the body and soul alike originative influence, in the growth of mental diseases. The theory is the one best sustained by modern induction, and is that which is most consistent, as will presently be seen, with the Christian standard.

Independently of the pathological difficulties in the way of the somatic theory, psychological research testifies most strongly against it. The mental and moral functions are the immediate products of an independent sphere of organism, and not to be explained by anything lying outside of that sphere. The brain and nerves have only the physical part of perception and motion, and to some extent the regulation of the functions to perform; but the soul cannot but be considered as distinct from this activity of the nerves. The somatic theory, which confounds the two, will never be able to make a satisfactory distinction between palsy and imbecility, between convulsions and ravings, between sensuous hallucinations and insanity. This theory, therefore, fails in affording support to any practical system of therapeutics.

§ 330. The psychological theory, at its first inception, split upon the opposite rock in denying the influence of the physical processes upon mental diseases in the face of experience. In opposition to the somatists, it was thought necessary to exclude all natural causes from the explanation of the origin of mental affections, and to ascribe them to an act of voluntary self-inthralment, which in all cases was to be attributed to some prior moral excess or delinquency incurred with a knowledge of the consequences. But a derangement of mind is not identical with sin. For, though every vice, every sin, is an abnormity of the soul, yet every abnormity of the soul is not sin. A lunatic may be, in a human sense, innocent of positive guilt; and, on the other hand, the worst of criminals may retain his sanity. It is impossible to adhere to this doctrine in practice without reducing the entire treatment of the disease to a system of rewards and punish-

§ 33. Probably some parts of the following brief analysis may at first sight appear hypercritical; but

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ments; and the vagueness of the idea of freedom and constraint, the impossibility of distinguishing between the moral thraldom of the criminal and that of the sick man, will throw into confusion the entire system of forensic psychology. It is equally wrong to derive all diseases of the mind from the passions, although the latter may be important causes, and, in the more advanced stages, symptoms of insanity. At the same time, as will hereafter be more fully shown, there is in the mass of cases of insane convicts such an amount of responsibility as to require the infliction of a degree of punishment which, though different from that imposed on the sane, will yet be accompanied with a corrective as well as a preventive discipline.

§ 331. The *intermediate* theory is that to which the soundest psychologists now tend. "In the first place," says Sir William Hamilton, "there is no good ground to suppose that the mind is situated solely in the brain, or exclusively in any one part of the body. On the contrary, the supposition that it is really present wherever we are conscious that it acts—in a word, the Peripatetic aphorism, the soul is all in the whole and all in every part—is more philosophical, and consequently more probable than any other opinion. It has not been always noticed, even by those who deem themselves the chosen champions of the immortality of the soul, that we materialize mind when we attribute to it the relations of matter. Thus, we cannot attribute a local seat to the soul without clothing it with the properties of extension and place, and those who suppose this seat to be but a point only aggravate the difficulty. Admitting the spirituality of mind, all that we know of the relation of soul and body is that the former is connected with the latter in a way of which we are wholly ignorant; and that it holds relations, different both in degree and kind, with different parts of the organism. We have no right, however, to say that it is limited to any one part of the organism; for even if we admit that the nervous system is the one to which it is proximately united, still the nervous system is itself

when the momentous importance of the subject, from the incalculable interests at stake, is considered, the

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universally ramified throughout the body; and we have no more right to deny that the mind feels at the finger-points, as consciousness assures us, than to assert that it thinks exclusively in the brain. The sum of our knowledge of the connection of the mind and body is, therefore, this: that the mental modifications are dependent on certain corporal conditions; but of the nature of these conditions we know nothing. For example, we know by experience that the mind perceives only through certain organs of sense, and that through these different organs it perceives in a different manner. But whether the senses be instruments, whether they be media, or whether they be only partial outlets to the mind incarcerated in the body, on all this we can only theorize and conjecture.

§ 332. The intermediate theory has at least not been rejected by standard Christian theologians. "The resurrection," says Bishop Pearson, "is not only in itself possible, so that no man with any reason can absolutely deny it, but it is also upon many considerations highly probable, so that all men may very rationally expect it. If we consider the principles of humanity, the parts of which we all consist, we cannot conceive this present life to be proportionable to our composition. The souls of men, as they are immaterial, so they are immortal; and being once created by the Father of spirits, they receive a subsistence for eternity; the body is framed by the same God to be a companion for his spirit, and a man born into the world consisteth of these two. Now, the life of the most aged person is but short, and many far ignobler creatures have a longer duration. Some of the fowls of the air, several of the fishes of the sea, many of the beasts of the field, divers of the plants of the earth, are of a more durable constitution, and outlive the sons of men. And can we think that such material and mortal, that such inunderstanding souls should by God and nature be furnished with bodies of so long permansion, and that our spirits should be joined unto flesh so subject to corruption, so suddenly

imperative necessity for the utmost perspicuity in language, and exactness and precision in reasoning,

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dissolvable, were it not that they lived but once, and so enjoyed that life for a longer season, and then went soul and body to the same destruction, never to be restored to the same subsistence? But when the soul of man, which is immortal, is forced from its body in a shorter time, nor can by any means continue with it half the years which many other creatures live, it is because this is not the only life belonging to the sons of men, and so the soul may at a shorter warning leave the body which it shall resume again."

§ 333. To this may be added the authority of Isaac Taylor, who, in his "Physical Theory of Another Life," after pointing out how completely the question whether the human soul is ever actually or entirely separated from matter is passed over by St. Paul as an inquiry altogether irrelevant to religion, continues: "Let it be then distinctly kept in view that although the essential independence of mind and matter, or the abstract possibility of the former existing apart from the corporeal life, may well be considered as tacitly implied in the Christian's scheme, yet that an actual incorporeal state of the human soul, at any period of its course, is not involved in the principles of our faith any more than is explicitly asserted."

§ 334. "We are unable," says Pascal, "to conceive what is mind; we are unable to perceive what is matter; still less are we able to conceive how these are united; yet this is our proper nature."

§ 335. "Such," says President Edwards, the first metaphysician of his country, and perhaps the first of his age, "seems to be our nature, and such the laws of the union of soul and body, that there never is in any case whatsoever, any lively and vigorous exercise of the will or inclination of the soul without some effect upon the body in some alteration of the motion of its fluids, and especially of the animal spirits. And, on the other hand, from the same laws of the union of the soul and body, the constitution of the body and the motion of its fluids may promote the exercise of the affections, but yet it is not

will be obvious; hence nothing can be unimportant which could by any possibility lead to incorrect con-

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the body, but the mind only that is the proper seat of the affections. The body of man is no more capable of being really the subject of love or hatred, joy or sorrow, fear or hope, than the body of a tree, or than the same body of man is capable of thinking or understanding. As it is the soul only that has ideas, so it is the soul only that is pleased or displeased with its ideas. As it is the soul only that thinks, so it is the soul only that loves or hates, rejoices or is grieved at what it thinks of. Nor are these motions of the animal spirits and fluids of the body anything properly belonging to the nature of the affections, though they always accompany them in the present state, but are only effects or concomitants of the affections that are entirely distinct from the affections themselves, and no way essential to them; so that an unbodied spirit may be as capable of love and hatred, joy or sorrow, hope or fear, or other affections, as one is that is united to a body."

Effects of Intermediate Theory on Responsibility.

§ 336. The intermediate theory, as above stated, relieves the doctrine of criminal responsibility of some of its chief difficulties. If the somatic theory be correct, then a criminal propensity is a physical malformation, for which the defendant is no more responsible than he is for a malformation of the limbs. A squint in morals, to carry out a metaphor of Chief-Justice Gibson, would in this view be no more a fault than a squint of the eyes. Such a criminal may be prevented from future misconduct; but, logically, neither punitive nor reformatory discipline can be applied to him; the first because it is unjust, the second because it is hopeless. Here indeed the representatives of the somatic theory practically divide. By some, permanent incarceration—and this solely on preventive grounds—is the only penalty to which criminals can be properly subject. By others, among whom Mr.

clusions. An unwarranted assumption, a deduction not *strictly* legitimate, an ambiguous expression, of no

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Bain is a modified representative, punishment is vindicated as having a necessary moral effect in reforming the criminal.

On the other hand, if the psychological theory be correct, insanity, by becoming an organic intellectual lesion, is as much withdrawn, it may be argued, from the casual power of the will as it is on the somatic basis. It cannot be reached by penal discipline, for by the very hypothesis on which it is framed it rises above the action of the nervous and corporeal system. It cannot be reformed by bodily correction; and to attempt, therefore, by such correction to reach it, would be both unjust and nugatory.

§ 337. The intermediate theory, however, teaches us that insanity (with the exception of idiocy and certain hereditary and organic types) is (1) in a large measure the result of nervous and physical causes, often voluntarily induced, partly by the negligence and partly by the misconduct of the patient himself; and (2) that in such cases, by being made the subject of penal discipline, it may often be prevented or restrained. The remaining difficulty is to determine what are the cases to which such penal discipline is applicable. And here the analogies of the English common law give us a safe test. Where *mania a potu* results from drink, the party becomes irresponsible. Where, however, he commits a crime in a voluntary drunken fit, this drunkenness avails him nothing, unless to relieve him from the implication of premeditated malice or complex fraud. Thus when the fatal assault is conceived by a party when intoxicated, he is not presumed to act with that premeditation or that specific intention to take life which is necessary to subject him to capital punishment. So it is in insanity. Mania, when a permanent disorder of the intellect, by incapacitating the party from reasoning on the particular issue, relieves him from criminal responsibility. But a mere "monomania," unaccompanied by intellectual lesion, cannot, for penal purposes, be considered else than voluntary passion. It may be invoked to lower the grade from murder in the

seeming importance in the connections in which it may sometimes occur, may in a different connection so change a proposition as to be the direct cause of error; therefore every appearance of inexactness should be carefully examined.

In the section just quoted "the three prominent hypotheses" are referred to, and immediately follows "the psychical theory," after defining which follows "the somatic theory," which they discuss at some length, then comes the "intermediate theory." What, then, are these; hypotheses or theories? or, are the terms synonymous? "*A theory is founded on inferences drawn from principles which have been established by evidence.*" "*An hypothesis is a mere supposition, or a proposition or principle assumed or taken for granted, to account for certain phenomena.*"[1]

While not irrevocably wedded to Dr. Taylor's definitions, we think them very good, and we respectfully submit that "hypothesis" and "theory" are not synonymous terms, and that as a *basis* on which to rest the "philosophy of the common law

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first to murder in the second degree by depriving the intent of that coolness and specialty necessary to make up the former offence, but it can never be the basis of an acquittal on the ground of irresponsibility.

[1] Taylor, Elements of Thought.

doctrine of insanity" something more stable than an hypothesis—"a mere supposition, or proposition or principle assumed, or taken for granted"—is imperatively required. We want something at least as fixed and permanent as an established theory, "founded on inferences drawn from principles which have been established by evidence." Whether the definitions quoted are received or not, we purpose showing that the "intermediate theory" of Messrs. Wharton and Stillé is an *hypothesis*, "a principle assumed or taken for granted to account for certain phenomena." Is not the *name* itself an ambiguity, a misnomer?

§ 34. If the term "intermediate" is used simply as a name, a designation, without attaching any *meaning* to the phrase, then it is a *new* theory and must be established *ab initio*, which has not been done; therefore it must be assumed that the name of the theory carried its ordinary meaning, and that the theory was intended to hold a position intermediate between the "somatic" and the psychological.

But does it hold, is it possible for it to hold, such a position? Granted that it occupies a less extreme position than either of the theories named, that does not necessarily, and does not in fact, in this connection constitute it *intermediate*, as that term postulates *con-*

nected extremes:—"noting the terms of a progression between the first and the last."[1] "Those general natures which stand between the nearest and most remote."

Intermediate cannot, therefore, be properly used between *unconnected* subjects. We cannot speak of anything being intermediate between love and colic, or between veneration and jaundice. Nor can we with any propriety speak of an intermediate between *opposites*. An intermediate between good and evil is unthinkable. We cannot take a little from each, say prayer and almsgiving from piety, and theft and murder from wickedness, and call the compound intermediate between sin and holiness. Observe, the term is not used as referring to the connection between body and mind, but between the psychical and "somatic" theories, which, from their bases, are simply affirmation and negation. The one theory affirms that mind is a distinct, self-existent entity, the other denies it. The whole superstructure of psychology is based upon the consideration of the mind as a distinct entity, a unit, indivisible, complete in itself, and for its existence independent of our physical organization; *per*

[1] Worcester.

contra, the "somatic theory" holds that the mind is not a distinct entity, but is a function of the brain or nerve-centres, hence incapable of existing apart from the physical structure of which it is a function; therefore the two theories being opposites, there can be no *inter medius* relation between them, consequently the name is a misnomer.

§ 35. Passing over the peculiar construction and ambiguity of the first sentence of § 329, "Originative" (an act) "influence in the growth" (a gradual development in which time is an indispensable factor) "of mental diseases," the section furnishes a large amount of *assertion*, but not one particle of proof. Surely so strange a position as that of the *body* originating disease of the mind calls for some explanation of the *modus operandi*, or for some verified proof of the fact, if fact it be; but, strange to say, *there is none there, nor is there any anywhere else in their work.* Bear in mind that they explicitly repudiate the "somatic theory" in the same section. "The mental and moral functions are the immediate products of an independent sphere of organism, and not to be explained by anything lying outside of that sphere; . . . the soul cannot but be considered as distinct from this activity of the nerves." According to the "psychical

theory" the mind may be diseased, and according to the "somatic" and "physical media" theories, certain physical organs may be diseased, disordering the mind, but, according to the "intermediate theory," how unfortunate the poor mind, for instead of *one* general source of disease it has *two*, as both *body* and *mind* may originate mental diseases.

Is it not a necessary sequence that if the body can originate and influence the growth of mental diseases, *the mind must be dependent upon the body for its health*, and if for its health, why not for its existence? Does not this approach the somatic view very closely, notwithstanding their disclaimer to the contrary?

Just *what* the intermediate theory embraces we do not know, as the authors have not thought it necessary to furnish any definition by which its scope may be limited, further than by it to claim for "body and soul alike originative influence in the growth of mental diseases," and in support of that claim *not a scintilla of verified proof is furnished by them.*

If the "intermediate" be regarded as a *modification* of the psychical and somatic theories, it might have been admissible to assume that in as far as either of those theories was adopted as a part of the "intermediate," so far its claims would be admitted without

verification, but those parts which were new, just introduced, ought certainly to have been explicitly defined, and fully authenticated by verified proofs.

The *ipse dixit* of any author, however eminent, if unsupported by conclusive reasoning or strong proof, is not sufficient to successfully launch a new theory, or even a modification of an old one, more especially on a subject so important, and one on which men of the most highly-gifted minds have written volumes almost without number.

The assertion that "psychological research testifies most strongly against it" (the somatic theory) is doubtless true in the estimation of some psychologists, but it is quite as true that the terms are reversed in the estimation of somatists. Two very eminent authors and investigators say, "On all hands it is admitted that the manifestations of mind take place through the nervous system; and that its derangements are the result of nervous disease, amenable to the same method of investigation as other nervous diseases. Insanity has accordingly become a strictly medical study, and its treatment a branch of medical practice."[1]

"On this point the controversies of philosophers

[1] Maudsley, Body and Mind, pp. 12, 13.

and metaphysicians, which have been taking place from time immemorial, have succeeded in arriving at but one thing—the expression in sonorous language of their ignorance, more or less complete, of the fundamental characters of psychical life.

"We must, indeed, penetrate into the inmost essence of the activity of cerebral life, into the complex phenomena in which it reveals itself, to arrive at a comprehension of the evolution of any voluntary act whatsoever, and the natural manner in which it expresses itself through the organism."[1]

In the next two sentences, Wharton and Stillé inform us that "The mental and moral functions are the immediate products of an independent sphere of organism, and not to be explained by anything lying outside of that sphere. The brain and the nerves have only the physical part of perception and motion, and to some extent the regulation of the functions to perform; but the soul cannot but be considered as distinct from this activity of the nerves."[2] These two propositions are denied not only by somatists, but also by many psychologists.[3]

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[1] Luys, The Brain and its Functions, p. 322.

[2] Med. Juris., § 329.

[3] Bain, Mind and Body; Calderwood, Mind and Brain, *et al.*

The last sentence of § 329 is unique: "This theory (somatic), therefore, fails in affording support to any practical system of therapeutics." A system, being all the known truths of some department of knowledge, the whole of any science, art, or doctrine, certainly ought to be self-supporting; but whether a system of therapeutics is, or is not, or whether the somatic or any other theory of mind or of insanity affords it any support, is entirely foreign to the subject. But it may be, and is, important whether any "practical system of therapeutics" supports any of the theories of mind or of insanity. According to the somatic and physical media theories, the administration of medicine to the insane is rational and scientific, and the therapeutics, *id est*, the explanation of the *modus operandi* of the remedies, is understood, because it is the operation of a material remedy on a physical disease; but the psychological and intermediate theories, both holding insanity to be a disease of that incorporeal entity, the mind, the exhibition of any medicine for the purpose of curing such immaterial disease would be unscientific, irrational, and absurd; as we assert, without fear of contradiction, that no physician, alive or dead, knows, or did know, anything whatever of the therapeutic action of any medicine in any disease

of the mind whatever, if that entity can be diseased. While from the well-established effects of medicines, intelligently administered, in many forms of insanity, very strong evidence is furnished against the *psychological* and *intermediate*, and in favor of the *somatic* and *physical media* theories.

§ 36. That "the intermediate theory is that to which the soundest psychologists now tend" may or may not be true, as it rests on a bare assertion that it does so. The quotation from the works of Sir William Hamilton indicates the fact that he does not belong to the extreme school of metaphysicians, who deny the reciprocal influences of mind and body, but he does not "attribute to the body and soul alike originative influence in the growth of mental diseases," which, as far as we are informed, is the distinguishing feature of the "intermediate theory." Being somewhat familiar with Sir William's admirable works, we affirm that no such doctrine is taught in his system of metaphysics.

After the assertion in § 329 that the "intermediate theory is most consistent . . . with the Christian standard," we are surprised to find in § 332 that "the intermediate theory has at least not been rejected by standard Christian theologians." "O, what a fall

was there, my countrymen!" Further comment is unnecessary, especially as the quotations from Bishop Pearson, Isaac Taylor, Pascal, and President Edwards (§§ 332–335) do not furnish any evidence either that the body can originate mental disease, that "the intermediate theory is that to which the soundest psychologists now tend," or that it is the "most consistent with the Christian standard," and, as we have given below the whole of the authors' claims in support of the intermediate theory, we leave our readers to judge of the correctness of our conclusions.

§ 37. Against the conclusions reached in § 336 we have nothing to urge, in so far as they refer to the *somatic* and *psychical theories,* as the conclusions are, that both are found to be impracticable in their application to the jurisprudence of insanity. We are at a loss, however, to understand how the "intermediate theory" relieves "the doctrine of criminal responsibility of some of its chief difficulties." As before stated, it is impossible to determine just *what* Messrs. Wharton and Stillé claim for the intermediate theory, but for the present that is unimportant, as they *must regard insanity as either a physical or a mental disease.* If the former, in what do they differ from somatists?

If the disease is physical, "then a criminal propensity is a physical malformation, for which the defendant is no more responsible than he is for a malformation of the limbs." If the latter, then "insanity, by becoming an intellectual lesion, is as much withdrawn, it may be argued, from the casual power of the will as it is on the somatic basis." Observe, the allegation "that body and soul alike (have) originative influence in the growth of mental diseases" does not relieve them, because it is the *mind*, the *incorporeal entity*, that is diseased. How originated, or by what influenced, is immaterial. The disease is "an intellectual lesion," and therefore "it cannot be reached by penal discipline; . . . it rises above the nervous and corporeal systems," and, as they say in § 329, is not to be explained by anything lying outside the independent sphere of its organism. Therefore invoking the *intermediate*, even were it an established theory, would not, "as above stated, relieve the doctrine of criminal responsibility of some of its chief difficulties." How easily and completely are those grave difficulties resolved in passing through the alembic of the physical media theory!

§ 38. Passing over the peculiarity that § 329 begins and § 335 closes the discussion under the heading

"INTERMEDIATE THEORY. *Its Basis,*" and that under the next heading, "*Effect of Intermediate Theory on Responsibility,*" the first sentence begins, "The intermediate theory, *as above stated*, . . ." leading the reader to suppose that the discussion of the principles and scope of the "theory" had been closed, a new claim is set up in § 337, which is as peculiar as its mode of introduction. We are told that "The intermediate theory, however, teaches us that insanity (with the exception of idiocy and certain hereditary and organic types) is (1) in a large measure the result of nervous and physical causes. . . ." The vagueness and want of perspicuity in enunciating and defining its scope is the only reason for supposing that the "intermediate theory" may so teach, as it is nowhere so stated in, nor is it reasonably implied from, the discussion of its basis. But as the authors claim that it does so teach, (without any verified authority), let us consider the reasonableness, the consistency, of such teaching from their stand-point. It is unfortunate that so large a class should be *outside* the benign operation of their "theory." Just *how* large the class "idiocy and certain hereditary and organic types" is, we do not know, as the term "organic type," as applied to *diseases of the* MIND, is inexplicable. If the mind in insanity is

diseased, as taught by psychologists and by the "intermediate theory" (§ 329), then the mind, being a unit, indivisible, must be organically diseased in all cases, as to think of *functional disorder* necessarily implies parts, divisibility, extension, and place.[1] If the terms were, however, interpreted by the somatic or physical media theories,—disease of the physical organism, — they are rational and easily comprehended. But if "insanity is in large measure the result of *nervous and physical causes*," in what does that view differ from that of the somatist? The student certainly ought to have been furnished with at least an hypothesis to which the how, the where, and the wherefore might have been referred, and which might have attempted a reconciliation with their previous statement (§ 329). "*The mental and moral functions are the immediate products of an independent sphere of organism, and not to be explained by anything lying outside of that sphere.*

[1] "It has not been always noticed, even by those who deem themselves the chosen champions of the immortality of the soul, that we materialize mind when we attribute to it the relations of matter. Thus, we cannot attribute a local seat to the soul without clothing it with the properties of extension and place, and those who suppose this seat to be but a point only exaggerate the difficulty."—*Sir William Hamilton's Lectures on Metaphysics*, p. 356.

. . . *the soul cannot but be considered as distinct from this activity of the nerves.*"

We verily believe that sometimes the misconduct which induces insanity may be prevented or restrained by penal discipline, but how that view can be received by those believing that the *mind* is diseased is the question Messrs. Wharton and Stillé will be allowed to answer. If insanity is the result of "nervous and physical causes," "then a criminal" (or an insane) "propensity is a physical malformation, for which the defendant is no more responsible than he is for a malformation of the limbs. A squint in morals . . . is no more a fault than a squint of the eyes," . . . and, "logically, neither punitive nor reformatory discipline can be applied to him,—the first, because it is unjust, the second, because it is hopeless" (§ 336). Nor is the dilemma less embarrassing for the "intermediate" than for the psychological theory, as both claim insanity to be a mental disease "distinct from the activity of the nerves," and the "product of an independent sphere of organism," as (§ 336) "insanity, by becoming an organic intellectual lesion, is as much withdrawn . . . from the casual power of the will as it is on the somatic basis. It cannot be reached by penal discipline. . . . It cannot be reformed by bodily

correction; and to attempt, therefore, by such correction to reach it would be both unjust and nugatory."

§ 39. *Mania a potu*, or delirium from protracted drunkenness, is given as an example of voluntarily induced insanity. They say, "Where *mania a potu* results from drink, the party becomes irresponsible. Where, however, he commits a crime in a voluntary drunken fit, this drunkenness avails him nothing," except to relieve him from implied "premeditated malice or complex fraud." This view has frequently had high official recognition, yet we think it illogical, unjust, and dangerous to the best interests of the people. Doubtless there *may* be cases in which the application of those criteria might serve the ends of justice, but standing *unqualified*, and unlimited, as they do, their effects are sometimes most unjust and pernicious.

When a person drinks to excess, the act itself an immorality, and continues that excess for a few hours, or it may be a few days, and in his drunken orgies commits a crime, he is justly held responsible for his criminal act. Is he less guilty or less responsible if he *voluntarily* continues that excessive drinking, thereby increasing the primary immorality, which forms the basis of crime in both cases; until that

drunkenness becomes *mania a potu?* The position is surely a marvel of logic and consistency. Declaring the perpetrator of the greater offence irresponsible, absolutely, without any qualification, appears to be a somewhat erratic mode of "restraining, if not preventing," the immorality which is the potential cause of crime in both instances. Would it not be much more rational to restrain the habitual drunkard, and, by preventing the first immorality, destroy the cause of crime in either condition?

It cannot be held that crime committed in the delirium of a drunken fit is punishable on the ground that the inebriate was *rational* at the time he perpetrated the crime; but on the ground that getting drunk was his own voluntary act, he knowing, when he began to drink, that drunkenness would deprive him of his reason and judgment, and that any casual exciting cause, when irrational, would probably induce him to commit some act of folly or crime. Hence his temporary insanity does not save him from the penal consequences of his act; not because of the transient nature of his madness, but because he voluntarily deprived himself of reason and judgment. Were the inebriation not his *voluntary* act, were he compelled against his will to swallow the intoxicating draught,

there could no responsibility attach to him for any act done under drunkenness so induced, any more than there could be for acts done in the delirium of fever, because in neither case could the person prevent the loss of his self-control; therefore, as a general rule, *voluntarily* induced *mania a potu* should no more relieve from responsibility than voluntarily induced drunkenness. The argument supporting non-responsibility in *mania a potu* is based on the fact that continued inebriation produces *organic disease*, and while he is the subject of that disease the patient has not the ability to control himself, owing to the presence of that pathological condition. At *first* his drinking was his own voluntary act, but continued indulgence changed the *disorder* of drunkenness to the *organic disease* of *mania a potu*, by which the will, reason, and judgment were subordinated, through diseased condition of the brain, and desire and appetite intensified, so that the ultimate result was not a voluntary act, but the result of the tyranny of a diseased organization, and, the disease being a progressive one, the law or society should have interfered and prevented its culmination. Where a person drinks excessively and continuously for a long time, steadily becoming more and more debased, until the end can be predicated almost with certainty, both

the officers of the law and society being cognizant of the fact, and neither interposing to prevent the consummation which is almost inevitable; are not both morally almost accessories before the fact to any crime committed by the inebriate after the loss of his reason? Inasmuch as they did not prevent him from depriving himself of reason when they could, and should, and when they knew that he could not or would not restrain himself, did they not virtually waive all moral right to inflict punishment upon him? And for this reason the law humanely relieves the maniac from responsibility. Such is the line of defence for the law as it stands, and while we acknowledge the cogency and force of the reasoning, yet we think the original objection much stronger,—strong enough at least to warrant the question of responsibility or non-responsibility being made an open one, *each case to be decided upon its merits as testified to by competent experts* without the interposition of fallacious legal tests. We differ *toto cœlo* from any authority which holds that *mania a potu*, or any disease which is "the result of nervous or physical causes," can be determined by "tests" from "the analogies of the English common," or any other common, or statutory, "law," or by any system of "tests," except where such tests are applied

by experts,—tests not of responsibility, but of *disease*. As this view of the province of experts is fully discussed in the next chapter, we dismiss the question, after indicating the way in which the unqualified statement, that "where *mania a potu* results from drink the party becomes irresponsible," may be made a source of danger to the community. One source of danger arises from the transitory nature of the disease, which usually lasts but a few days. A good actor, well informed as to his part, feigning mania, may *for a few days* so successfully perform his assumed rôle as to deceive the most experienced expert, but, who would be unmasked were he to attempt the same imposition for months or even weeks. Again, suppose a bad man, desirous of revenge for some real or supposed grievance, knowing that the law would hold him irresponsible for any and every act while he was the subject of *mania a potu;* might he not drink excessively for the very purpose of inducing the mania which would effectually shield him from punishment were he to gratify his malignant bent by the perpetration of any crime however enormous? After a few days of hard drinking, not necessarily to profound intoxication, he finds phantoms occasionally flit athwart his vision; he takes one more drink, the

first effect of which is to brace up his shaky condition and dispel the phantom forms, then he commits the intended crime to avoid the responsibility for which he has been preparing by a deliberate course of dissipation; his crime committed with its attendant excitement, his arrest, and the abrupt stoppage of his stimulants, he becomes in a few hours the unfeigned subject of a severe attack of *mania a potu;* by such a course, requiring much less cunning in planning and much less judgment and ability in execution than are often exhibited by criminals, he goes unwhipped of justice for a crime perpetrated with coolness and deliberation, because "the analogies of English common law give as a safe test" that "where *mania a potu* results from drink the party becomes irresponsible."[1] Where a person, not an habitual drunkard, suddenly commences a course of inebriation and continues it until crime and *mania a potu* supervene, all the circumstances and all the motives ought to receive the most rigid scrutiny, and in some cases the whole course of conduct will be found to

[1] The above *supposed* case is not a draft upon the imagination, but, rather substantially a *report* of what I am morally certain, actually occurred in two cases which transpired under my personal observation.—*Author.*

have been one of deliberate design throughout. Who dares to say that such a person is less responsible than if the crime had been committed by him in a drunken fit? May not the "legal test," which is intended to protect society and punish crime, be thus easily converted into a cloak, under cover of which the most horrible crimes may be perpetrated with impunity?

§ 40. *Mania a potu* being an *organic disease*, must, with all of its class, take its place with "idiocy and certain hereditary and *organic* types." What, then, remains of insanity to be benefited by the application of the "intermediate theory," as the exceptions, even according to Messrs. Wharton and Stillé, cover nearly the whole range of disordered mental manifestations?

Having somewhat closely followed the "intermediate theory" from the statement of "its basis" to the close of its "effects" on "responsibility," the following conclusions are, we think, correctly reached:

§ 41. (*a*) That the name "intermediate" is a misnomer. (*b*) That it cannot correctly be considered a *theory*, because (1) no explanation of its *modus operandi* has been offered; (2) because no verified facts or conclusive arguments have been furnished to establish the chief factor of its basis,—*id est, that the body originates diseases of the mind.* (*c*) That, considering the

intermediate as a *modification* of the *somatic* and *psychological theories*, the modifications should have been as explicitly stated, as fully explained, and as completely authenticated as should be an original theory; which has not been done, nay, has scarcely been attempted. (*d*) That, waiving the *bare assertion* that the "intermediate" is a "theory," there appears to be no reason for considering it anything more than an *hypothesis*, "a proposition or principle assumed or taken for granted," to harmonize some of the phenomena of insanity with the common law; and that (*e*), as almost all the classes of insanity are among the "exceptions," even assuming the "intermediate" to be an established theory (which is not the fact), Messrs. Wharton and Stillé have failed to show how it to any appreciable extent "relieves the doctrine of criminal responsibility of some of its chief difficulties." And (*f*), finally, that an hypothesis or unauthenticated theory such as the "intermediate" does not possess the necessary stability or scientific accuracy to be with any propriety used as a basis for "the philosophy of the common law doctrine of insanity."

CHAPTER V.

EXPERTS.

Definition of Experts in Insanity—General Medical Practitioners are not Experts in Insanity—Non-Experts ought not to be allowed to give Evidence as Experts—Result pernicious when so allowed—Precedent—Many Legal "Precedents" discarded Medical Opinions—Importance of studying the Reasons which underlie Judicial Decisions—Conflict between Expert Opinions and Legal Tests—The Question of Responsibility considered—Crime cannot be committed by an Insane Person—Insanity a Question of Fact for the Jury, not of Law for the Judges—Only Experts can diagnose Insanity—Hypothetical Cases—How prepared—Want of Opportunity and Skilled Observation—Prepared by Interested Parties—Deceptive and Untrustworthy—Alleged Insane Prisoners should be sent to Insane Asylums, and Superintendents after Examination should depose directly to the Question of Insanity—Sanity or Insanity of Testators—Guiteau Trial—Responsibility already fixed by Law—Necessity for Amendments in the Law—Judges' Responsibility—Experts' Irresponsibility—Remedy—Insane Prisons should be provided—Scheme for securing Responsible, Trustworthy Experts—Benefits that would accrue—Contradictory Legal and Expert Tests of Insanity cannot both be correct—Judges *vs.* Judges—No settled Legal Criteria of Insanity—Criminal Legal Tests, if applied, would turn Thousands of Lunatics loose from Insane Asylums—Mode of examining Expert Witnesses criticised—Probate Insanity Trials—Important Discoveries and Improvements hindered by Excessive Fear of Innovation—Harvey, Jenner, Simpson—Qualification of Experts—Medical Profession—Responsibility and Services—Brothers, Expert and Judge—Official Reconciliation of Conflicting Expert Opinions—"American Medi-

cal Association"—Vexed Questions settled—"Association of Medical Superintendents of American Institutions for the Insane"—Experts worthy of Trust—Conclusions.

§ 42. "EXPERTS, who are they, and what are their qualifications?" ask Messrs. Wharton and Stillé, and they reply, "Here emerges the first difficulty in this vexed question. Experts are to have a certain degree of credit attached to their testimony, and, indeed, according to views expressed in 1871 in New Hampshire, are to declare what irresponsibility is; but who are experts? Forensic-psychological medicine is the specialty, and an expert in this specialty must be skilled in three departments of science,—(1) law sufficient to determine what is the responsibility which is to be the object of the contested capacity; (2) psychology, so as to be able to speak analytically as to the properties of the human mind; (3) medicine, so far as concerns the treatment of the insane, so as to speak inductively on the same subject. If either of these factors is wanting, a witness cannot be technically an expert."[1] "But while such, on pure rules of law, is strictly the case, the courts have modified first one and then another of these requisites,

[1] Wharton and Stillé, Med. Juris., § 275.

until it is difficult to see what special qualifications are still to be viewed as constituting experts."[1]

The last clause quite explains why the subject of expert testimony is such a "vexed question." Doubtless, in the earlier trials, where the element of insanity was a constituent, it was very difficult, if not quite impossible, to find persons having the necessary qualifications required by the "pure rule of law," and of necessity judges had to dispense with "first one and then another of the requisites" of those whose testimony they were obliged to receive and, to some extent, depend upon in insanity trials.

But whatever may have been the necessity for modifying, or rather obliterating, the standard of the qualifications of experts in the past, *there is none now*, as there are to be found in every State of the Union those who are well skilled in the "three departments of science," and when there are such gentlemen, experts in the correct use of the term, to be had, it is passing strange that they are not *exclusively* used by the courts, where expert testimony in insanity cases is required. We cannot too strongly condemn the reprehensible practice which now generally ob-

[1] Wharton and Stillé, Med. Juris., § 276.

tains, of requiring any person who writes M.D. after his name (and even the right to do that, often a self-constituted one) to go into court and give evidence as an expert, while he knows nothing that in a *strict*, nay, even in a *general*, sense could be called the special qualification which must be possessed by the individual to make him worthy the designation, expert in insanity.

§ 43. Judges ought to know, lawyers ought to know, and the public ought to know, that general medical practitioners, however able and deserving of confidence they may be *as such*, are *not* experts in insanity; that *no amount of general*, will compensate for the want of *special*, knowledge; that they know no more respecting insanity than any equally well educated person outside the profession of medicine; and to the practice of using such physicians as experts is due largely the disgraceful uncertainty of the verdict in every trial in which insanity is an element. Is it strange that witnesses who have only vague, undefined ideas of a subject so complex, should give unscientific and absurdly incorrect and contradictory evidence respecting it? Are those who perpetuate the practice of requiring or allowing such persons to give testimony as experts, when experts in the

proper sense of the term may be had, free from the grave responsibility of materially aiding the uncertainty of insanity trials? If the evidence on which juries are obliged to form their opinions of the facts on which their verdicts are based is unscientific and untrustworthy, it necessarily follows that, in giving a true verdict, according to the evidence, that verdict must be as unreliable and untrustworthy as is the evidence on which it is based, and the punishment of insane persons or the escape of criminals becomes a matter of hap-hazard. The statement of Chief-Justice Chapman, of Massachusetts, in the trial of Andrews, in 1868, was in one sense undoubtedly correct: ". . . it often appears that experts can be found to testify to any theory, however absurd." His honor, however, appears to have ignored the fact that the court was possibly more blamable than were those whom he was censuring, because the court, knowing that the witnesses had not, or not knowing that they had, the necessary qualifications to constitute them experts, compelled or allowed them to testify as such. After receiving the testimony of persons who had no *special* knowledge, who, in a critical sense, were utterly ignorant of the subject on which they gave evidence as experts, the taste and justice might be questioned in the

remark, by the same judge, "I think the opinions of experts are not so highly regarded now as they formerly were." The *true* expert (the qualification appears to be necessary from common usage) should, nay, must, know law, psychology, and medicine. The general medical practitioner, on whom the courts generally depend for expert testimony in insanity cases, knows medicine, but nothing of law or psychology, and yet is expected to give correct evidence where a knowledge of all three sciences is necessary, a proposition about as reasonable as requiring from one known, to find the values of two unknown quantities.

§ 44. When graduating, general medical practitioners are required to know something of chemistry, gynæcology, microscopy, surgery, including surgical operations of the eye and ear, and yet they are not considered *experts* in any of these departments, would not, for example, be employed to make a quantitative chemical analysis or microscopic examination of the viscera and their contents for the detection of poison, nor would they usually be allowed to testify in a suit for malpractice where surgical operations of the eye or ear had been performed, unless they could show *sufficient special* study and training, nor would they be

as chemists, microscopists, oculists, or aurists. Those, and those only, who could show that by special study and training they had acquired the necessary *exact* knowledge in their several specialties to constitute them experts, would be permitted to testify as such. It may be urged here, that as the expert has no knowledge as to what the mind is *per se*, therefore, not knowing its normal condition, he cannot understand its abnormalities. But let it be borne in mind that the physician does not know what either *fever* or *inflammation* is *per se*, yet the symptoms of these diseases point unerringly to the pathological condition, *which he does understand*, and so in like manner do the symptoms—the mental manifestations, point unerringly to the pathological condition of the "*physical media*," on which they depend.

Without a *general* knowledge in all of the above departments a student of medicine would not be permitted to graduate, yet in such cases he is properly not considered an expert, while in insanity cases, in which the student in medicine received no instruction, was asked no questions at graduation, he is permitted, nay, compelled, to give evidence as an expert. *There is not a medical college in the United States that in its regular curriculum ever graduated an expert in insanity*

Many colleges have not even a chair of medical jurisprudence; many that have, require only half the time to be devoted to that branch that is required in chemistry, anatomy, surgery, midwifery, and practice of medicine; and even in those colleges in which medical jurisprudence receives the largest amount of consideration and attention, the instruction is chiefly directed to the detection of poisons, the evidences of criminal abortions, infanticides, malpractice, the method of making post-mortem examinations, giving testimony in court, etc., while the subject of insanity is very briefly, if at all, discussed, for the sufficient reason that the professor has not the necessary time at his command to give more than, at most, a cursory glance at that most complex of all the specialties of our profession, as any person must be well aware who has made any proficiency in the study of "medico-legal relations of insanity."

§ 45. The question may be asked, Why is it necessary to have specialties in the medical profession? For the same reason that they exist in all professions. The field of investigation in scientific medicine is too large, too extensive, to be fully occupied by any one man, even in a long lifetime of close study and application. By peculiar adaptability, or by the force of

circumstances, one person devotes his time and ability to an exhaustive study of one branch of the great tree, to the comparative neglect of the other branches, and, *pari passu*, knows more of the subject of his special study than does the general practitioner or the specialist in any other department; hence, if our eminent specialists do not know all that is to be known in their several departments, they certainly do know all that *is* known, and therefore if their conclusions are not always entirely accurate, they are the nearest to accuracy that can by any possibility be obtained. The specialty of insanity requires more varied and more extensive study than any other specialty in our profession, and yet those in our profession who have never given it any special study, who in a critical sense know nothing about it, are the experts, so called, on whose testimony questions of the most momentous importance are usually determined.

§ 46. At the meeting of the AMERICAN MEDICAL ASSOCIATION, held at Chicago in 1877, the writer read a paper before the "*Section on Medical Jurisprudence*," in which it was stated, " . . . And yet, because a gentleman has the right to add M.D. to his name, he is compelled to go to court and give

opinions as an expert (on insanity) on a subject that he was not required to study when acquiring his medical education, and probably has not had any fitting opportunity for studying since his graduation; in fact, a subject of which he knows no more than any other educated gentleman who has given the matter no special study whatever; and on such evidence the most important of all earthly interests, life, liberty, and property, are determined."[1] And that paper, after thorough discussion, was *unanimously* received and directed to be printed in the proceedings of the Association, the highest commendation of that representative body, which authoritatively declares the opinions of the medical profession of the United States. (Reference is here made to what is generally known as "*Regular Medicine.*")

§ 47. Probably some of my readers may think that there is a waste of energy in proving that which appears so reasonable, that few, if any, will doubt the propriety or correctness of the position advocated. *Theoretically,* the conclusions here arrived at are admitted by almost all the members of both professions, law and medicine; but, strange as it may seem, both

[1] *Vide* Transactions Am. Med. Assoc., vol. xxviii. p. 366.

professions *practically* deny them. Lawyers still compel by subpœna or warrant the attendance at court of general medical practitioners to testify as experts in insanity cases as heretofore, and, as of old, the M.D., instead of stating to the court and jury that he is not an expert in insanity, as required, gives his crude, unscientific, and hence untrustworthy testimony, and such opinions are received by juries as the authoritative conclusions of experts, when the witness on the stand often does not know enough of the subject to be aware of the profound depths of his own ignorance, or how much more a specialist in that department must know before he would be properly entitled to give expert testimony in such cases. Very often three, four, or half a dozen such witnesses are called for the prosecution, and as many for the defence, all testifying as experts, when there is not a single expert among them,—not one whose testimony ought to have been received by the court, because none of them, in a scientific sense, knew anything of the subject regarding which he testified. Who is responsible for the continuation of this pernicious practice? Both lawyers and doctors are to blame, and both professions are responsible, because both know better, and it is sometimes difficult to suppose them free from improper motives

while perpetuating this baleful practice. Medical witnesses in insanity cases are often allowed to testify as experts without even being asked whether they consider themselves experts or not. Were that question put directly to them, few would answer in the affirmative; but a simple answer in the affirmative is not enough; they ought to be required to state the course of study pursued, opportunities had, and length of time devoted to acquiring a knowledge of their specialty, just as surgeons, oculists, aurists, architects, engineers, etc., are required to show that they have a special knowledge in their several departments before they are permitted to testify as experts. It is not a matter of surprise that unskilled persons testifying as experts in insanity cases, where the gravest interests of humanity are at stake, should mislead, instead of instructing, the court and jury, but it almost passes belief that the courts will permit such testimony to be given or received; and to that practice is largely due the opprobrium attached to the uncertainty of verdicts in insanity cases.

§ 48. When one of the ablest medico-forensic writers of the age declares, referring to such uncertainty in verdicts, that "Were the issue to be decided by tossing up a shilling, . . . it could hardly be

more uncertain,"[1] there is surely sufficient reason for judges, and all persons in any way influencing the administration of justice, to change from the mode of procedure which has brought them so much obloquy, especially as the system is unsound in theory as well as most pernicious in practice, derogatory to the dignity of the courts, unjust to the science of medicine and experts proper, demoralizing to experts falsely so called, eminently unjust to litigants and unsatisfactory to the people; and "the practice" is adhered to for no better reason of which we are aware than that of following "*precedent.*" Junius says, "One precedent creates another. They soon accumulate, and constitute law. What yesterday was fact, to-day is doctrine. Examples are supposed to justify the most dangerous measures; and where they do not suit exactly, the defect is supplied by analogy."[2]

§ 49. How many of the "precedents" and legal maxims referring to insanity have had their origin and development as described by Junius? All that we now deem ancient was at one time new, and what we now defend by examples on a future day will stand

[1] Maudsley, Responsibility in Mental Diseases, p. 101.

[2] Junius, Dedication, p. vi.

as precedents.[1] On examination these "precedents" will be found to be largely based on the opinions of physicians, and that, too, of an age when the study of medicine included the occult and marvellous; when superstition and vain speculation occupied the time now devoted to reason and scientific observation; when instead of rational treatment, spells and incantations were among the most potent remedial agents in their pharmacopœia; when the then medical profession had no rational views on insanity, but considered it a special visitation of the Deity in his anger, or attributed it directly to demoniacal possession. Reiteration of false medical opinions of past ages, even by the most distinguished judges and medical jurists, will not make them correct, nor will designating them "precedents" and "legal maxims" make them a whit more trustworthy; being scientifically unsound when first uttered, unsound they remain; and are most pernicious when used to override the scientific evidence of reliable experts.

Judge Cooley, the distinguished ex-chief-justice of Michigan, eminent for his legal ability, deprecates the study of "precedents" and "decisions," instead of "en-

[1] "Omnia quæ nunc vetustissima creduntur, nova fuere: et quod hodie exemplis tuemur, inter exempla erit."—*Tacitus.*

deavoring to get right down to the reasons" which underlie all correct decisions. He says, "I suppose your worthy chancellor has long before this said to you that the principal thing in giving instruction in the law is to teach young men how best to employ their reasoning faculties—how to think—and that this is the main thing in the practical administration of the law. To be a good lawyer is not so much to have a knowledge of what is in the books—that particular judges have decided so and so; it is not even to have the faculty of bringing together the decisions that have been made from time to time with a view to using them. A faculty of making ready use of decisions is of course worth a great deal to us; but there is always danger that it may prove unfortunate, in that it teaches us to rely too much on what courts have said, instead of endeavoring to get right down to the reason of things upon which all judicial decisions, if they be of any value, must rest.

"And now I believe that the main thing that is to be taught in schools or in lawyers' offices, where young men are trained, the way to receive any valuable training at all, is to reach the reason of things that underlie the rules of law which are laid down for our guidance; and that the most unfortunate thing

that can ever happen to a young man as he starts out to fit himself for the profession of the law is to learn to rely upon rules without reaching under these rules, to see upon what they are based. If, standing here for the moment to look into these eager faces I can impress that one idea upon you, that you should give your principal time, thought, and attention, while you are in this school, or while engaged in the practice of the law, to reaching the reasons that underlie the law, it will give me great pleasure to have been here; and to anticipate the time when you shall be in successful practice, that you will remember that in this informal talk I endeavored to impress upon you the transcendent importance of a study of principles." [1]

Judge Doe says,[2] "When the authorities of the common law began to deal with insanity, they adopted the prevailing medical theories. The distinction between the duty of the court to decide questions of law, and the duty of the jury to decide questions of fact, was not appreciated and observed as it is now in this State. . . . Without any conspicuous or material partition between law and fact, without a plain demarcation

[1] Informal Address to Law Students, St. Louis, Mo., May 10, 1882.

[2] State *vs.* Pike, 49 N. H., 399.

between a circumscribed province of the court and an independent province of the jury, the judges gave to juries, on questions of insanity, the best opinions which the times afforded. In this manner, opinions purely medical and pathological in their character, relating entirely to questions of fact, and full of error as medical experts now testify, passed into books of law, and acquired the force of judicial decisions. Defective medical theories" (hypotheses?) "usurped the position of common law principles. The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory pretending to be legal authority, cannot appeal for support to our reason or even to our sympathy."

As time rolled onward, and the touchstone of science was applied, false theories, hypotheses, and superstitions, that had formed a considerable part of "leech-craft," were discarded by the medical profession; many of them are doubtless forgotten; but, strange as it may seem, some of the worst of these discarded erroneous views have been crystallized into immortality by a sister profession under the dignified titles of "precedents" and "legal maxims."

Until a comparatively recent date there was no rational care taken of the insane. Now there are

many large asylums, where skilled specialists watch with scientific eye the many phases in which insanity is presented, and from the large numbers under their care these experts have ample opportunity for the investigation of the pathological conditions, and their comparison with the mental phenomena of the insane.

§ 50. The medical superintendents and their assistants in asylums for the insane (excepting a few cases in which *political considerations prevail over personal fitness* in their appointment) are gentlemen of high culture, mature judgment, and eminent for their medical knowledge and scientific attainments, and possessing all these qualifications and advantages, they have been, and are, devoting their whole time to the study of insanity in every form in which it presents itself. Many of these gentlemen have also studied the "legal relations of insanity," and are, therefore, experts in the proper use of that term, as they possess all the qualifications required by Messrs. Wharton and Stillé, quoted at the beginning of this chapter. Such experts have time and again testified that many of the so-called legal tests of insanity are unsound and untrustworthy; that the "right and wrong" test is unscientific and contrary to fact; and yet, with no special knowledge of the subject, judges have often charged juries, in the

face of such expert testimony, that knowledge of "right and wrong" is THE test of insanity. As remarked by Judge Doe, in the very able opinion referred to, "In these cases, the testimony of the experts negatived the idea that knowledge of right and wrong is the test. And the admission of this evidence, coupled with the rule given by the court to the jury that knowledge *is* the test, brought the law into conflict with itself. Either the experts testified on a question of law, or the court testified on a question of fact. . . . It is the common practice for experts, under the oath of a witness, to inform the jury, in substance, that knowledge is not the test, and for the judge, not under the oath of a witness, to inform the jury that knowledge is the test. And the situation is still more impressive when the judge is forced by an impulse of humanity, as he often is, to substantially advise the jury to acquit the accused on the testimony of the experts, in violation of the test asserted by himself. . . . If the tests of insanity are matters of law, the practice of allowing experts to testify what they are, should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified to testify as an expert. To say that the expert testifies to the tests of mental

disease as a fact, and the judge declares the test of criminal responsibility as a rule of law, is only to state the dilemma in another form."

In answer to the able reasoning of Judge Doe, whose elaborate opinion they quote at length, Messrs. Wharton and Stillé reply, "Is, then, responsibility a question of fact, to be determined by the jury on the testimony of experts? Is the judge, on issues of insanity, to leave the whole question, including that of responsibility, to experts to decide, telling the jury that they are to accept the experts' rendering? Is, in other words, the test of criminal responsibility a matter of fact, to be deposed to by experts, and found by the jury on their testimony? Such are the questions that are involved in the position just stated, and which are now to be discussed."[1] That no injustice may be done to the learned authors, we quote below their reasoning against the opinion of Judge Doe.[2]

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[1] Wharton and Stillé, Med. Juris., § 192.

[2] § 193. It is conceded by the learned judge who delivered the opinion which has last been quoted, and which maintains the affirmative of the points just stated, that the views he advances are in conflict with the great body of Anglo-American decisions on the same topic. This, in fact, will be abundantly verified by an inspection of the preceding pages, where the course of English and American judicial precedent in this relation is exhibited. It is proposed now to pass the question of authority, therefore, as one that does not admit of dispute, and to

§ 51. If the phrase, leaving "the whole question," means simply the question as to the sanity of the in-

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adduce some general reasons to show why, so far from accepting the positions which have been so ably maintained by the New Hampshire judges, we must reaffirm the view already announced—that, while experts may be called to testify as to states of mind and conditions of health, it is for the court to declare whether such states and conditions constitute irresponsibility.

§ 194. First, let it be remembered that American common law courts have no process for the collection of the opinions of experts on litigated questions of criminal responsibility. A case comes on to be tried in one of our criminal courts. In the great majority of our jurisdictions there is no law by which a commission can issue to take the deposition of witnesses out of the reach of local process. Even in those jurisdictions where such a law exists there is no reported case of a witness, residing at a distance being examined by deposition. Indeed, even where this is technically legal, the step is one which parties would be very unlikely to take. An expert, in order to give an opinion to which the jury will attach weight, must visit the patient personally. Hence it is that practically, in seeking for experts, the parties are limited to those whom they can produce on trial. Of course, when there is wealth, or when the State makes, as it very rarely does, suitable provision, experts may be brought from a distance. But, whether brought from a distance or taken from the immediate neighborhood, they are open to the very serious objection that they are unofficial persons selected by the party calling them, because their pre-ascertained views will serve that party's necessities. For we have in none of our States governmental boards of experts, chosen as independent arbiters, on the same basis as our courts of law. Hence it is that the experts, whose testimony the jury are to take, are simply voluntary theorists. So far as concerns the defendant, they are called by him because, from their opinions already advanced, their views favor his defence. It is by the defence, indeed, that testimony of experts in issues of insanity is mainly produced. It is natural that it should be so, for not only is the burden of proof on

dividual, the answer ought, unquestionably, to be in the affirmative. Whether that practically includes

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the defence, but the interest the defendant has at stake is so enormous, that his whole energies, and his entire estate, as well as the full professional nerve and pride of his counsel, will be exhausted in bringing his case fully before the court. Just so far as the prosecution takes an interest in the case—just so far as it believes in the baselessness of the defence—is it liable to be influenced by the same zeal. But there is here a difference between the position of the defence and that of the prosecution. The defence springs its witnesses, if not its particular point of reliance, on the prosecution. The prosecution has generally to reply, as best it can, with any testimony which, at the moment and spot, it can catch up.

§ 195. But, be this as it may, each party has certain theories to be proved, and each party looks around for experts to prove such theories. Now, it so happens, that there is scarcely a single hypothesis as to responsibility, no matter how wild, which, among the large number of experts who have concerned themselves with this branch of study, has not its advocate. Some particular hypothesis is a convenient one for the emergencies of the case, and consequently the expert who believes it is sought out and summoned. But he, and the few, as it may be, who agree with him, are summoned alone. The great mass of experts, embracing ninety-nine hundredths of the entire body, are left uncalled. There is undoubtedly one good physical reason for this. No court-room, though as large as the Roman amphitheatre, could hold all those who on this topic have fair claims to be considered experts. No State treasury would attempt the expense of their maintenance and remuneration during the very protracted investigations that would ensue. No court would have time for such trials; and, indeed, it would be impossible to tell how long such a suit would continue. No humane government would permit a course which, by thus confining all the experts of the land (even if we stopped here) in one spot, for an indefinite period, would leave their innumerable patients and wards for so long a time without guidance. But, independently of this objection, reason

the question of responsibility will be discussed hereafter. If it is not the province of the expert to de-

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enough for a narrow selection is found in the fact that each party calls only the experts that will prove his case, and no more.

§ 196. Now, how has this practically resulted? We believe that the reports of our criminal trials show that there is not a case in which it was necessary to rely on some extravagant and unique psychological theory to make out a defence, in which such theory was not sustained by experts. Thus, in a remarkable Kentucky case, hereafter to be more fully noticed, it was testified by experts, and apparently without contradiction, that all persons committing suicide are insane, and that consequently (a conclusion in which fortunately the court did not coincide), the exception of suicide in life-insurance policies is a nullity. So in the case of Arthur O'Connor, who was tried in London in April, 1872, for an assault on the Queen, Dr. Tuke testified to the prisoner's insanity, because he had no sense of his situation, and because he "argued in a circle," which facts were declared by an opposite medical expert to prove just the contrary, while Dr. Sheppard, Professor of Psychological Medicine in King's College, and head of the Colney Hatch Asylum, announced, in an article in the *Lancet*, that Dr. Tuke's position was "monstrous." So also in Andrew's case, where the defence was *mania travisitoria* (*transitoria?*), one physician (a gentleman highly respectable, but standing almost alone in this respect) was brought to testify to the psychological soundness of the defence; while the prosecution limited itself to but one expert in reply, though it could have found a thousand to endorse what that expert said. So in the case now immediately before us, "dipsomania" is spoken of as proved by medical experts; and it is said to be the law that if these experts declare that there is such a disease as "dipsomania," and that "dipsomania" confers irresponsibility, then the defendant is irresponsible. But what experts? Who are to declare this? Those selected by the defendant out of that small knot of psychological physicians who hold to this theory? And is the court to be bound by the views of those experts, supposing the prosecution declines to reply, or replies

clare whether the individual is or is not insane, for what purpose was he called? The accused either is

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imperfectly? Is the judge to shut his eye to the fact that by almost all modern psychologists—by all the governmental forensico-legal experts of Germany, by whom such great breadth and ability of diagnosis is exhibited, and by whom such unparalleled patience and compass of induction exercised—by at least a preponderating weight of opinion among English and American alienists—the theory of distinct moral mono-mania, the mind remaining sane, is not only repudiated but denounced? But how is this fact to be shown? The prosecution has not the means or time, even if it has the desire, to bring these eminent men to the witness-stand. There is no process in other words, in which the true sense of experts, taking them as a body, can be obtained. The test, therefore, is one which, from the inadequacy of our judicial machinery, we cannot apply.

§ 197. But, again, even supposing experts of conflicting views could be fairly and liberally summoned, so as to give the jury the full renditions of science on the questions in litigation, there is no court of experts, who can harmonize antagonistic views, and give to the jury in a concrete shape a positive and final judgment. In *legal* practice, from the fact that in each State there is a final court of appeal, this difficulty is obviated. We all know what the law is; or, if we do not, we have the means, in each litigated case, of ascertaining such law. And in this certainty, at least as much as in the wisdom of the opinions promulgated, lies our safety. Take, for instance, to repeat a prior illustration, the question of moral insanity. If moral insanity be established by the courts, then the legislature can take measures to have all persons "morally insane" placed in insane asylums, so that no injury to the community can ensue from their running at large. Or, if the courts hold that "moral insanity" is not a defence, then persons of this class will be held responsible penally for their misdoings, or placed under bonds to keep the peace. But if the rule is to be laid down by experts called freshly in each particular case, with no court of appeal, it will be impossible to have any settled law. The experts selected in

or is not insane. Assume that no responsibility attached to the question, but simply as a matter of

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one case will prove entirely a different law from the experts selected in another case. For instance, in those cases in which the State takes the prosecution in its own hands, and calls, as is the practice in some jurisdictions, men of high station as psychologists, the testimony will be that there is no such thing as either monomania or "moral insanity" as a distinct insane affection. On the other hand, in a case in which the defendant's mental sanity is indisputable, and his life may depend on his proving that "moral insanity" is a good defence, experts who hold to "moral insanity" are called to prove it exists; and "moral insanity" is so far established. From neither of these decisions is there any appeal. There is no mode of harmonizing them. Nor is it possible to tell what the future may bring forth, except that each party will call such experts as are most favorable to his views. Now, to speak of the opinions of such special experts as the opinions of experts in general, and declare it to constitute the rule of insanity, is about as reasonable as it would be to speak of the arguments of counsel employed to argue on a series of isolated cases, as constituting the law of the land. The fact is there is no settled and final opinion of experts, to supply the test which is here invoked, because there is no final court by whom conflicts among experts can be reconciled and a settled law pronounced.

§ 198. But, after all, we must next observe that the proposed submission of the tests to experts for decision is an illusion, for the court will have to explain what it is that the experts say. No court can abdicate its functions of weighing testimony and of declaring what testimony means. It is, indeed, a fundamental maxim of the law that witnesses are not to be counted, but weighed. Let us take, as illustrating this necessity, the celebrated Windham case, elsewhere more fully noticed. A petition of lunacy was taken out against Mr. Windham, his nearest relatives being the petitioners. His course was shown to have been since his boyhood—at the time of the inquisition he was not much older than twenty-one—one of reckless and imbecile

information it was desirable that it should be determined, who would be called upon to decide the

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profligacy; and some of the most eminent experts, called for the petitioners, declared that he was wanting in capacity to manage his own affairs. But the testimony thus produced was overborne, as to numbers, by a mass of other experts, who, on examination far more superficial, and on tests far less thorough, pronounced for the respondent's competency. Of course, in such cases, there was but one course open to the master in lunacy by whom the inquisition was held. His duty was to say where the weight of the testimony was, and by what tests it was to be proved. So it must always be in cases of conflict of evidence. Yet to declare, supposing the testimony of experts to be "law," where the weight of this testimony lies, is really to declare what the law itself is.

§ 199. Nor can harmony be by any other course adjusted between civil and criminal law. In many classes of probate cases the question of a testator's sanity is taken from the jury and determined exclusively by the court. In all civil issues this is forced by demurrers either to the pleading or to the evidence. Even on jury trials, the legal relation of the testimony of experts can be removed, by bills of exceptions, or by appeal, to the Superior Court. To declare that in criminal cases such questions are solely for the jury, guided by experts, would be to introduce not merely clashing of courts, but failure of justice. A man would be sane by one class of proceeding, and be insane by another. After being declared responsible by an inquisition of lunacy, he might be declared irresponsible by a jury on an indictment for crime; and thus would he be too irresponsible to be punished as a criminal, and yet not irresponsible enough to be placed in an insane asylum. Or, under the direction of experts of opposite views, a man who, in a civil court would be held insane, might be convicted by a jury as sane, without any right, on the hypothesis here combated, of appealing to the court for redress.

§ 199*a*. But, finally, we must fall back on the position already fully argued, that the question of irresponsibility is one that cannot, con-

question, experts or judges? Would the decision be considered a question of law or a matter of fact? Let it be remembered that the expert does not in any case declare *directly* as to his opinion of responsibility. His only province is to declare whether or not the

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sistently with public justice, be surrendered by the courts. Responsibility is a judicial question. It is of the highest grade. It touches the most cherished prerogatives of citizen and state. It involves in its criminal relations two topics, both of which are in the range of juridical philosophy, and both of which should be decided, in each case that arises, by officers of the state, appointed by the state, bound by fixed rules, and advised, before they decide, by counsel who will present both sides of the question at large. One of these topics is the relation of responsibility to reason, and here arises the principle heretofore discussed on grounds purely juridical, that wherever there is reason there is responsibility. The other topic is that of the divisibility of the Ego into distinct factors, one of which can become insane while the other is sane; and in this is involved the position hereafter to be vindicated, that there is no such thing as moral insanity coexistent with mental sanity. These points are not to be finally adjudicated by experts, who are neither appointed by the state, so as to be independent of party choice, nor are selected from their general judicial fitness, nor are bound by precedent, nor are advised before they come to a decision, by counsel presenting fully both sides. Experts are no doubt to give facts, though their exploration of facts should not be made without notice to the opposite side. But questions of high philosophical jurisprudence such as these, bearing as they do most closely on the liberty of the citizen and the safety of the state, should be decided by judges, who, appointed by the state, independent of the parties, and advised by counsel, remember that their decision is to be part of a harmonious and equal system of public law, and that for their rendering of it they are responsible to the state, from which their appointment proceeds.

accused is insane. If the judge can determine that point, why go through the farce of calling experts at all? It will be observed that it is only because the law says an insane person is irresponsible for his acts that even *indirectly* the expert touches the question of responsibility. Were the law so changed that insanity would be no bar to responsibility, then the declaration of the expert that the accused was insane would have no legal significance. Insanity has been shown to be a manifestation of physical disease, and whether a person is diseased or not is certainly a question of fact for a medical expert to determine, and the law, whether the *lex scripta* or the *lex non scripta* is immaterial, in declaring that certain responsibilities shall or shall not follow the absence or presence of certain forms of disease, does not change the relative positions of the patient and physician, nor confer a right upon the judge who is not an expert to invade the domain of those whom the courts, as well as the people, recognize as medical experts; therefore the *fact* of sanity or insanity in the accused ought to be determined by the jury from the testimony of the medical experts.

§ 52. If it is considered imperatively necessary that the judges should determine the question of insanity

by some "precedent" or "legal maxim," so as legally to control responsibility, then, in the name of consistency, change the law so that the expensive farce of calling experts shall be abolished. Expunge the words insane and insanity from the law, and have in their stead some of the many legal tests of insanity now in use, as a knowledge of "right and wrong," "complete or limited alienation," or any other term that may be considered in accordance with the legal view of responsibility; but while the question is "sanity or insanity," let it be determined by medical experts, who alone are competent judges of that fact.

It is not claimed that there are no cases of insanity which can be determined by those who are not experts according to the "pure rule of law." The raving maniac with no lucid interval, the drivelling idiot, or the confirmed melancholic needs no *special* knowledge to determine his or her deplorable condition; unfortunately for them, they are so far removed from rationality that any person of ordinary intelligence could not well be mistaken as to their condition; about such there is no dispute. Judges, lawyers, doctors, juries, neighbors, and friends, all agree respecting such unfortunates, and when they are required to attend courts it is simply *pro formâ*. But, as against these

extreme cases, there are all degrees of mental power, from the imbecile, who cannot be taught that two and two make four, to the genius of a Newton, and all grades of mental disturbance, from the raving maniac to the person who is popularly known as "a little off his balance." The extremes of both these conditions are easily determined with certainty, but between these there is a whole chromatic spectrum of mental conditions, in which the tints are so closely blended as to be almost indistinguishable, and when the case is a mean between the two extremes—lies close to the indistinct, wavy line of demarcation which divides sanity from insanity, then who but the skilled expert can determine to which class he belongs? Nay, even to experienced experts such cases are very perplexing, especially where the person has a *motive* for being considered insane, as in the case of criminals whose only defence is insanity, and the exact condition in such cases can only be positively ascertained by having the suspected party under the surveillance of an expert continuously for a sufficient length of time, where he may be carefully watched when he supposes himself alone and unobserved.

§ 53. Another pregnant factor in the uncertainty of verdicts is the prevailing practice of presenting

cases hypothetically to the expert. It is notorious that there are many cases in which it is impossible for one eminent physician to report to another equally eminent a case under his daily care, so exactly and clearly, that the latter would be justified in giving an opinion as to treatment without a personal examination of the case.

There is much to be learned by skilled observation that cannot be transferred to paper with sufficient accuracy to enable the reader to form an opinion as to the precise condition; hence the universal custom of having medical consultations at the patients' bedsides. What are the hypothetical cases presented in court from which an expert is expected to decide correctly as to the *exact* mental condition of a prisoner? The cases thus presented in court, even if honestly prepared, consist of a number of symptoms, manifestations, and appearances that are believed to *closely resemble* the symptoms, manifestations, and appearances exhibited by the accused. By whom have these observations been made, and by whom are the hypothetical cases prepared? Even if by an experienced expert, they might mislead, because those things which *closely resemble* are not *identical.* But hypothetical cases are not supposed to be prepared by ex-

perts. They are prepared and presented by lawyers who are not skilled observers, and generally not from extended observation, two or three visits of short duration being the usual limit, and frequently not from personal observation at all, but from the reports of friends or attendants who also are not skilled observers. With no intention to do injustice to eminent members of a sister profession, we say that they have no qualifications whatever that fit them for preparing a hypothetical case of a physical disease. They know nothing of pathological conditions, nor are they qualified to report accurately symptoms or indications of disease. This may probably be denied by lawyers, but it is true nevertheless. Any ordinary observer could notice that a person had a bad cough and expectorated freely, but an ordinary observer could not determine whether that cough and expectoration were the result of irritation of the fauces, influenza, bronchitis, or tubercular consumption. Diseases so widely different in their origin, location, pathology, and terminations have two prominent symptoms common to all of them. The ordinary observer notes and reports *only those prominent symptoms* and appearances.

Dr. Luys has admirably shown the absolute necessity for skilled observation. He says, "Thus, for

instance, when I auscultate the chest of a patient, and perceiving the existence of tubular respiration, declare that the patient is in the second stage of pneumonia, I give utterance to a judgment that has many ramifications in my mind, and is made up of a great number of different materials.

"Starting from this blowing noise that has struck my ear, I represent to myself what, under similar circumstances, I have perceived on previous occasions. I have observed, for instance, that this blowing noise corresponds to a hyperæmia of the pulmonary tissue, with concomitant induration, that it depends upon an induration of tissue, not upon the presence of effused *fluid*. At the same time I perceive with my eyes the general condition of the patient, I note his countenance, his external habit, the state of his tongue, etc., and a new series of notions acquired by the exercise of optic impressions, is awakened in my mind and becomes associated with the process already begun by the auditory impressions. I percuss, moreover; I feel the pulse; I palpate; and once more, starting from a new series of sensorial impressions that come into play, new regions of the *sensorium* are associated, set in vibration, and take their part in the complex operation that is taking place. The different regions of my

brain are successively affected. Notions formerly acquired are laid under contribution; they come forward of their own accord on the occurrence of the excitation with which they are methodically connected as contemporary memories; and thus the personality, reminded of the primordial impression, and enlightened by the total product of the related notions that spring up automatically, pronounces its judgment with a sufficient number of materials, and expresses the manner in which it is effected in a verbal form which is the index of its present condition. Thus it is that in pronouncing the words 'pneumonia—second stage,' I epitomize a whole series of former notions, methodically grouped, which have made their appearance in my mind, *motu proprio*."[1]

No expert could with certainty determine from a non-expert's report the existing *disease*, because the trained eye, ear, and touch were wanting in the observer. The *subtile symptoms unnoticed*, or not understood, by the common observer, being just *the* symptoms that enable the expert to determine with certainty the character of the disease, while the prominent symptoms, which alone were noticed by

[1] Luys, Brain and its Functions, pp. 294–95.

the unskilled observer, furnish no clue whatever as to the exact nature of the malady or *cause* which produced the symptoms or manifestations.

§ 54. The above illustration, which is only one of a score that might be used, shows that unskilled observation would be necessarily fatal to a recognition of common, ordinary diseases; and diseases of the nervous system, especially of the nerve-centres, being generally much more obscure, would therefore require more special training to enable the observer to note and interpret their indications correctly than would be required in determining any of the above-mentioned common diseases. Another grave objection to the use of hypothetical cases arises from the fact that they are prepared by lawyers, who, on one side at least, are the paid agents of their clients and therefore interested, and whose zeal for the interest of their clients is at least as prominently manifested as is their faithfulness in representing the actual facts of the case to the court and jury. Besides, they are often assisted by skilled observers (who are not witnesses at the trial, and consequently not under oath) in the preparation of their hypothetical cases for one-sided presentation. Obscure yet highly important symptoms are entirely omitted, or, if noticed at all, touched so lightly that

attention is not aroused to their importance, while other symptoms or appearances which favor their side are brought into prominent notice—are urged again and again upon the attention of the court and jury. The judge and jury, not being experts, and therefore being unacquainted with the importance of the symptoms lightly touched, or uninformed as to those omitted, necessarily arrive at incorrect conclusions, however correct and logical their conclusions may be as to the symptoms actually presented to them. Again, in preparing his hypothetical case the lawyer has plenty of time and skilled assistance if he desires it, so that he can adroitly choose his words and dexterously combine the symptoms and their sequences. Not so the opposite side. It is sprung upon them and upon the experts, and both may fail to detect the subtleties which tend to, and often do mislead. By such manipulation, wherever the evidence, if fairly brought out, would leave nearly an equipoise between *pro* and *con.* the case may be turned to whichever side exhibits the greater skill in preparing its hypothesis; hence such cases are generally decided not on their merits, but on the adroitness and skill of the counsel employed. In every case where insanity is to be the defence for crime perpetrated, the prisoner ought to be

committed to an insane asylum, and be there kept until by observation and direct examinations made, the medical experts are fully satisfied as to his mental condition, and then require them to give their opinion and the reasons for such opinion, *directly to the court and jury* in the form of a deposition. Were that method adopted, at least one grave source of uncertainty would be obviated.

§ 55. It is unquestionably a fact that in some forms of insanity there are intervals when the mind is clear, or when there are what are commonly known as "*lucid intervals.*" There is also the condition known as "irresistible" or "uncontrollable impulse." It is not inconsistent with occasional attacks of "irresistible impulse" that there should be lucid intervals of longer or shorter duration, during which periods the insane individual may conduct himself with ordinary propriety. He can reason correctly and forcibly on subjects with which he is familiar. Nay, one of the distinctive features of *general mania* is that the "reasoning . . . does not so much fail in the force and logic of its arguments as in the incorrectness of its assumptions."[1] From information obtained through

[1] Ray, Med. Juris. of Insanity, § 346.

a few visits made by unskilled observers, it would be impossible to represent such cases hypothetically with that accuracy which would be indispensably necessary to warrant an expert in giving a *positive* opinion as to the mental condition of the prisoner. In the trial of Guiteau for assassinating President Garfield, the utter worthlessness of "hypothetical cases" was practically demonstrated. It was alleged, during the trial, that unless extraordinary license were given to Guiteau to enable the experts, then and there, to study his mental condition, grave doubts existed as to whether the assassin could be convicted. We do not vouch for the truth of the allegation, but it is charitable to believe that either that or some other equally cogent and weighty reason induced the learned judge to waive, during the trial, the usually severe decorum of a court of justice, engaged in determining the guilt or innocence, sanity or insanity, of a prisoner charged with the commission of a crime the most heinous known to the law. The proceedings during that memorable trial were characterized by the conspicuous absence of gravity, dignity, and order, and had, to the eyes of those who did not divine the intention of the court, the appearance of a burlesque or the enactment of a farce, rather than of a solemn trial for the deliberate, un-

provoked murder of an innocent person (waiving all mention of the exalted rank and responsible official position of that individual). It is not creditable to the United States that its judicial machinery is so defective that, for the purpose of securing justice in the case of the murderer of its chief executive, the judge had to allow the prisoner such license as brought the court to the verge of contempt. Few trials in the history of civilization have more loudly proclaimed the urgent necessity for amending the law and judicial modes of procedure, especially as the abrogation of dignity and decorum does not in any way arise *ex necessitate rei*. Had Guiteau been sent to an insane asylum for a sufficient length of time before his trial, to enable the medical experts to study him thoroughly, at such times and under such circumstances as in their ripe experience they considered the best suited to disclose exactly his mental condition, does any sane person suppose those experts would have been less likely to arrive at the truth in that way than by the undignified, disorderly, and irritating method which was adopted? A crowded court-room, with the gravest of personal interests pending, and the consequent excitement arising therefrom, does not by any means furnish the best opportunity for study-

ing the mental condition. It is well known that undue responsibility or excitement, in some individuals, would induce mental perturbations, which, if alone observed, would mislead as to the general mental state. In all cases where there is doubt as to the sanity of a person it is of great importance that he should be observed under *different circumstances*, and at different times, and by far the most important of these is *when he supposes himself secure from human observation.* In feigning insanity the mental strain is so tense that it cannot be kept up indefinitely; hence, when the person supposes himself entirely unobserved, the mask will be thrown off and he will appear as he really is.

In this trial there were two "hypothetical cases" presented, one each by the prosecution and by the defence. If these were sufficient, why were so many experts kept so long away from their homes and those under their professional care, in Washington, at such great expense to the government? If it was necessary that they should be kept, so that they could make daily personal observation of the prisoner, then the "hypothetical cases" failed to represent the case intelligibly to the experts, hence were valueless. One of the expert witnesses in giv-

ing his testimony stated that he had changed his opinion since he had observed directly the manifestations of Guiteau's mental condition. Would he have changed his opinion from studying the "hypothetical cases" presented? In no other way than by *direct* observation and examination can imposition be with certainty detected. When the proof of guilt is so clear that no other plea is tenable, insanity is often relied on by criminals as their only defence, and, either from previous observation or under instruction, insanity is feigned, and sometimes so adroitly is the assumption maintained, *that for months* eminent experts have been baffled in detecting it, even when under their immediate, daily care in asylums. Unfortunately, the practice generally followed in such cases ignores those who *alone* are capable of detecting the imposition, and in consequence many of the worst criminals go "unwhipt of justice." And to add to the uncertainty caused by the lack of competent witnesses, the "hypothetical case" is introduced, which, as has been shown, is almost certain to mislead; and as a means of arriving at facts in any given case is unreliable and untrustworthy.

§ 56. The question is forced upon us, is there a

necessity for continuing the inexact, uncertain circumlocution of having "hypothetical cases"? The desideratum is to have the facts of the case clearly and concisely presented to the court and jury, so that they may be readily and fully apprehended. Why use inexact, uncertain, cumbrous methods to reach exact conclusions? It is urged that *direct* evidence is not admissible, because it would take the question of responsibility from the court and transfer it to the witness. How much of this is strictly true? As shown before (*ante*, p. 147), it is the *law* that declares the irresponsibility of the insane, not the expert, who simply declares that the accused is or is not insane; for were the law changed so that insanity would not void responsibility, then the statement by the expert that the person was insane would not at all affect that question. Under any and all circumstances, if the testimony of the witness is believed by the court and jury, whether as to facts or theories, the witness largely takes the responsibility of the decision of the case upon his shoulders, and of that responsibility he cannot practically be divested; hence the general usage of providing for the punishment of the witness who testifies falsely. Suppose a suit for alleged malpractice in setting a broken thigh to have occurred during the

late war, the law declaring that a weakened, shortened, and deformed leg would exempt the subject from serving as a soldier. The expert witness in testifying that the leg had been broken, was unskilfully set, was weakened, shortened, and deformed, would as directly testify to the liability of the person so injured to be drafted as would the expert who testified to the insanity of a criminal be to his irresponsibility; because in the one case the *law* declared the negation of liability to enlistment, and in the other the negation of responsibility, and in neither case did the expert testify as to the liability or responsibility. All the sections quoted from Messrs. Wharton and Stillé's work will not be considered *seriatim*, as that course would be unnecessarily tedious, but the principles involved will be freely discussed and frequent reference made to them. The sections referred to, collectively, appear to constitute a fair *apology* for the uncertainty of verdicts, owing to defective laws or modes of legal procedure. Are our laws of Medo-Persian inflexibility? Are we, Mongolian-like, to adhere to an erroneous system of procedure simply because the "precedents" and "maxims" therefor are hoary with age; when, by the advancement of science, many of those "precedents" and "maxims" have been

shown, time and again, to be scientifically incorrect and false in fact, therefore utterly untrustworthy? It ought to be borne in mind *that uncertainty of verdicts in any class of cases through defective laws or legal machinery is* NECESSARILY *a source of the grossest injustice.* There cannot but be injustice often done "where the conviction or acquittal of a prisoner is a matter of chance . . . the less insane person sometimes escapes, while the more insane person is sometimes hanged."[1] Why make courts the seeming authors of injustice? Why not amend the laws and change the legal modes of procedure, giving to the courts the necessary authority to make their verdicts reasonably certain, and therefore respected? Because the *principles* of law are immutable and eternal, it does not necessarily follow that those principles have been always understood and correctly applied; and when science furnishes conclusive proof that they have been misunderstood or misapplied, then it is time to amend, not the principles, but the erroneous practice based on a misconception or misapplication of those principles. In § 194, and again in § 196, we are informed that there are a number of legal pro-

[1] Maudsley, see *ante*, § 1.

visions necessary if any departure is to be made from the usual routine of practice; at least such would appear to be the inference, as, if they were not considered necessary, why refer to them? We are told that there is no legal process for the collection of expert opinions; there is no general law for issuing commissions to take depositions of experts residing at a distance; experts are unofficial persons, as we have no governmental boards of experts. Considering the paramount importance of criminal jurisprudence, if these or any other provisions are necessary to the administration of justice, they ought to be promptly provided; and as it is the interest of all respectable parties to have justice done, if proper representations of the desiderata were made to Congress or to State Legislatures, there would be no difficulty in securing the necessary legal enactments, as no party would oppose such legislation.

In § 195 the many objections to experts, so called, have their climax in the want of room. "No court-room, though as large as the Roman Amphitheatre, could hold all those who on this topic have fair claims to be considered experts." In penning the *argumentum ab inconvenienti* just referred to, Messrs. Wharton and Stillé evidently forgot, or disregarded, their

own definition of expert (see § 275). Had they adhered to that definition they would not have found so many who have fair claims to be considered experts as to inconveniently crowd a court-house much smaller than the Roman Amphitheatre. A strict enforcement of that definition would remove all the objections urged in that section. In § 196 the question is asked, "Is the judge to shut his eye to the fact that by almost all modern psychologists . . . the theory of distinct moral monomania, the mind (intellect?) remaining sane, is not only repudiated, but denounced? But how is this fact to be shown? The prosecution has not the means or time, even if it has the desire, to bring these eminent men to the witness-stand." We think the answer unquestionably should be in the affirmative. Even should the case be made much stronger by supposing the judge to be an eminent psychologist and physician who had spent many years as superintendent of an asylum for the insane, so that he, in the strict use of the term, was an expert in insanity, the answer ought still to be in the affirmative.

Whether the matter in variance exists between individuals or between the State and individuals, the judge is supposed to hold a strictly impartial position between them, and to apply the principles of law to

the evidence furnished in all cases brought before him for adjudication. Is he then expected or permitted to furnish the "means," "time," or "desire" to the prosecution, so that the cases may be brought in complete form before his court, or shall he supply their defects from his own knowledge? Suppose the prosecution to be equally remiss in presenting the facts, say, in a case for murder,—had no witnesses in court who could testify that a murder had been committed and that the prisoner at the bar had committed that murder; would the judge be warranted in directing the jury to *assume* both that the murder had been committed and that the prisoner had committed it, because he himself believed, or even well knew, such to be the fact, when no evidence had been offered in court in support of the indictment? The want of "means," "time," and "desire" would be excellent reasons for blaming the prosecution with incapacity or negligence, in which culpability the State might possibly be included, if it had not furnished the prosecuting officer with the necessary means. But the judge would place himself in a dangerously false position were he to undertake to supply their lack of evidence from his own knowledge.

Again, the jury are sworn to render "a true verdict

according to the evidence." How could they render a verdict of guilty against a prisoner when no proof of his guilt had been offered? Still, assuming the judge to be an eminent expert in insanity, and that the prosecution had neither the "means," "time," nor "desire" to place eminent experts on the witness-stand, and that the judge permitted men, not eminent, to testify as experts, men who in fact, were not experts, and these witnesses testified in behalf of the defence to the existence of moral, separate from intellectual insanity, as a distinct form of mania, and that the prisoner at the bar was the subject of that form of mania; and, through the incompetence or negligence of the prosecution no rebutting testimony was offered, would the judge be warranted in utterly ignoring *all the testimony that had been presented,* directing the jury to find for the prosecution, because he himself believed that there could be no moral without intellectual insanity? One of the *facts* to be determined by the jury is the credibility of the witnesses. Now, assume that the witnesses who gave testimony were reputable physicians, men of good standing for integrity and veracity, but really unskilled as experts in insanity, could the judge direct the jury that however reputable and trustworthy they, the witnesses were as

men, yet as experts their evidence was false, viewed from a scientific stand-point, and therefore utterly unreliable? Are not the conclusions of science, testified to by witnesses, matters for consideration and determination by the jury? Besides, the judge *had permitted the witnesses to testify as experts*, knowing that they were not, or not knowing that they were, experts in insanity, and according to Messrs. Wharton and Stillé (§ 277*a*), on the authority of Tullis *vs.* Kidd, 12 Ala., 648, "*After* a witness has been admitted to testify as an expert, evidence cannot be given to the jury of the opinions of other experts in the same science as to whether the witness was qualified to draw correct conclusions in the science on which he had been examined, though such testimony might have been properly offered to the court to show the competency of the witness *before* he was admitted to testify." In the foregoing illustrations it has been assumed that the judge was also an eminent expert, and that the witnesses who testified were not; but change the assumption by supposing that the witnesses were eminent experts, and uncontradicted by any other expert testimony, would the judge be justified in directing the jury to ignore their united testimony on his own supposed superior individual knowl-

edge? But change the assumption again, and this time to what is generally the fact *id est*, that the judge was not an expert in insanity. With what propriety could he direct the jury to ignore testimony on the ground that it was scientifically incorrect, hence untrustworthy, when in fact he had no knowledge in the premises more correct or reliable than the improperly so-called expert witnesses? Therefore, in any view, the interrogatory of Messrs. Wharton and Stillé ought to be answered in the affirmative; otherwise, why keep up the expensive practice of having witnesses and juries? Why not have every case decided by the *ipse dixit* of the judge, and not on the testimony of witnesses, but on his own knowledge? The arguments of Messrs. Wharton and Stillé are strong ones against the present mode of conducting insanity trials. They admit the many and grave defects of the system, but as a remedy they appear to advise the judges to assume a dangerous authority and unwarranted responsibility utterly inconsistent with the genius of our free institutions. That grave defects exist few will deny, but are they necessarily irremediable, or remediable only by adopting other modes of procedure, perhaps not less objectionable? We think not. *When expert testimony is required, let it be given*

only by experts. Let the judges imperatively enforce the rule that in insanity cases none but those eminent for their ability, knowledge, and experience in their specialty be permitted to testify as experts, and give such experts full opportunity for informing themselves of the actual condition of the alleged insane person, and then require them to depose directly to the court and jury as to his sanity or insanity, and their reasons for such opinion.

§ 57. This, of course, would bring prominently forward the question of the propriety or safety to the public of intrusting private persons—*id est,* persons not officers of the State—with so grave a responsibility. While, as has been shown, *theoretically* the law, not the expert, fixes the responsibility, yet, since the law says that the insane are irresponsible, the determining of the fact of sanity or insanity *practically* may be said to fix the responsibility, and we think it would be unwise to intrust such responsibility to any person, however well qualified, who is not directly accountable to the State as its officer; and therefore we would consider it advisable not only that none but experts be allowed to testify as such, but, further, that none but eminent experts, who are also officers of the State, be eligible to be called upon to give expert testimony

in insanity trials, and we can generally have in the medical superintendents and their first assistants of insane asylums, just such experts as are required.

§ 58. But where so grave a responsibility is imposed upon any particular class of officers, it is not enough that they are *generally* competent and trustworthy; they ought *always* to be so; and to secure that desideratum we make the following suggestions:

(*a*) Let every State appoint a board of examiners, to be composed of one or more eminent lawyers, physicians, and psychologists, and hereafter require every person, before he can be appointed to hold the office of medical superintendent or first assistant superintendent of any State asylum for the insane, to furnish satisfactory evidence of being a graduate of some reputable medical college, and to produce a certificate of having passed an examination before that board, and that he is well skilled in each of the three departments of science,—"law, sufficient to determine what is the responsibility which is to be the object of the contested capacity; medicine, and psychology, so as to speak analytically of the properties" (or attributes) "of the human mind,"—and that medical superintendents and their first assistants, qualified as above required, and who have been in the active discharge

of their duties as such superintendents or assistant superintendents in State insane asylums for years, shall be the only persons hereafter eligible to give evidence as experts in insanity before any State court.

(*b*) Let a similar board be appointed by the United States, or let the general government accept the State experts as the *only* experts who will be permitted to give evidence in insanity trials in the United States courts, or *vice versa.*

(*c*) Let it be a part of the official duty of such medical superintendents and their first assistants to give testimony as experts whenever so required by competent authority, *receiving no remuneration for preparing depositions or attending court to give evidence as experts.* (Let it be made a misdemeanor for such officers to receive any compensation, directly or indirectly, for service as experts.)

(*d*) As an expert can only be called when the premises upon which he founds his conclusions cannot be understood by the court or jury without study or knowledge on that special subject, or to inform the court and jury on a subject which can only be understood by special study, the expert should be considered *amicus curiæ,* and as such should be subpœnaed not "on behalf of the prosecution" or "of the

defence," but on behalf of the court, regardless as to which of the parties to the trial desired his services.

(*e*) Let the several States, interchangeably with each other and with the general government, make arrangements for the remuneration *to the State* for the services of such experts, when used otherwise or elsewhere than by the State of which they are officers. And until the necessary legislation shall have given effect to the foregoing provisions, let the courts imperatively require of all persons giving testimony as experts in insanity trials that they be, or have been, medical superintendents or first assistant medical superintendents of insane asylums, and that they have held such positions respectively for a period of not less than five consecutive years, as those, and those only, who have had such experience can be properly considered experts in insanity.

(*f*) Let there be established, near to, but separate from, some State insane asylum, an *insane prison*, to which shall be committed (1) all who are known to be dangerous lunatics; (2) all who have been relieved by competent courts from responsibility for crimes committed by being declared insane. (3) Let it be required of all persons accused of crime, who may hereafter interpose the defence of insanity, that they

shall, at the option of the prosecuting officer, be committed to the insane prison pending the trial, or for such time as shall be deemed necessary for the satisfactory examination of their mental condition by the experts in charge thereof. Persons in classes "1" and "2" to be committed to the insane prison for the term of their natural lives, and to be released only by the clemency of the governor of the State, he acting on a certificate from a commission to be composed of the superintendent of the insane prison and of the superintendents of two State insane asylums, which certificate shall certify that the insane person has been cured of his malady and may be set at liberty without danger to the community; and any persons so in confinement shall have the right at any time, but not oftener than once in six months, to demand an examination by such commission in respect to their mental condition, and a notification to the superintendent of the insane prison of their desire shall be deemed a sufficient demand. All persons belonging to class "3" to be committed by the magistrate or police justice to the insane prison, there to remain for such time as may be reasonably necessary to enable the superintendents of said prison and of the contiguous insane asylum to satisfy them-

selves as to the mental condition of the prisoner, and when so satisfied, the said superintendents shall depose directly to the prisoner's sanity or insanity to the court having jurisdiction, they giving the reasons for the conclusion or opinion at which they have arrived, which depositions shall form a part of the record, and on which, the said superintendents shall be liable to examination and cross-examination at the instance of either the prosecution or defence, and the question of *sanity* shall be determined by the court *before* proceeding to try the question of *guilt.*

Were the foregoing, or some such provisions rendered operative, both prosecution and defence could always alike command the services of *thoroughly qualified, responsible experts, and none other,* and the experts, having ample opportunity for the most careful examination, could speak positively of the mental condition of the prisoner; and the accumulated depositions would, in process of time, furnish experts' opinions on every phase of insanity, which would greatly conduce to the uniformity and certainty of verdicts in insanity trials. The desideratum, *par excellence,* is certainty, uniformity, and justice of verdicts, but in addition to the major benefit a number of minor ones would follow as neces-

sary sequences: (1) The experts being required to give their services, free of charge, alike to the State and to defendants, a large item of expense would be obviated, and the rich, in that important particular, would have no advantage over the poor, and the disgraceful scenes too often enacted would be prevented—that of having an array of doctors on each side of a case, conducting themselves, while giving testimony under the sanctity of an oath, as if they were counsel for the parties, instead of witnesses, each side trying to aid those by whom they were subpœnaed and paid, often, apparently, regardless alike of scientific truths, and good conscience. (2) The time occupied in trials would be materially shortened, as the long array of so-called expert witnesses, testifying to any number of absurdities and vague speculative theories, or rather hypotheses, would give place to two or three experts who, on behalf of the court, would give positive and trustworthy testimony in the premises, obviating the great length of time now usually occupied in cross-examining the so-called experts, with the view of exposing their lack of knowledge and breaking down their evidence. The cross-examination of the two or three experts would generally be of short duration, as few

lawyers would expect to render nugatory the testimony of those thoroughly skilled in their specialty. (3) The experts would not be subject to the *local bias* which is so often an influence highly prejudicial to the ends of justice. (4) The duties of medical superintendents of State insane asylums are now of great responsibility, for the proper discharge of which they are directly accountable to the State, and if giving testimony as experts were made a part of their official functions, they would reasonably be expected to be as careful and conscientious in the discharge of the most public part of their duty,—that part which would provoke the most criticism, as they would of any other obligation pertaining to their official position, and, their official standing being dependent upon the satisfactory performance of their duties would be a sufficient guarantee of their faithfulness and probity, especially as, being witnesses for the court, unpaid by either party, there would be no inducement to favor either prosecution or defence.

In determining the sanity of testators, when that is called in question before the courts, the same principles may be applied as in criminal trials, but not with equal certainty, unless, indeed, an ante-mortem examination of the testator, at the time the will was

executed, was made by experts. When such examination has not been made, experts may be used by the courts in the character of *interpreters*. A witness unacquainted with our language uses words and symbols that are not understood, hence the necessity for the employment of an interpreter, who shall inform the court and jury what the foreigner's words and symbols mean; so, in like manner, assuming the testator's words and actions to have been somewhat incoherent and irrational, if these symptoms of mental disorder are not understood, there arises a similar necessity for the employment of experts who shall *interpret*, for the information of the court and jury, the meaning of the symptoms as testified to, and explain what relation these manifestations of mental perturbations have to intellectual disorder or insanity.

§ 59. Another objection strongly urged by Messrs. Wharton and Stillé is the want of any ultimate court where the opinions of medical experts can be harmonized. "There is no process . . . in which the true sense of experts, taking them as a body, can be obtained. The test, therefore, is one which, from the inadequacy of our judicial machinery, we cannot apply." § 196. If this is all true, we again ask, why not change the "judicial machinery"? Is the oppro-

brium attaching to insanity trials to go on increasingly forever, because, to prevent it, some change in our "judicial machinery" is found to be necessary? When the teaching or practice of any science is found to be defective by or through the advancement of knowledge, it ought to be changed, and it is only a question of time when it will be changed, and defective modes or "judicial machinery" are not excepted from the operation of that general law. It will be found, however, that there *is* a process by which the opinions of true experts, taking them as a body, can be, and have been, harmonized.[1]

§ 60. At present, however, we shall consider the harmony of tests and rulings that obtain in the courts. And here we desire to state, distinctly, that in animadverting on the rulings of courts we disavow any disrespect to the individual or to the office; it is the *system*, not the individual or the office, which we censure. As has been shown, insanity is a symptom or result of physical disease. How, then, can a judge give a *legal* test for the symptom or result of a *physical* disease? It is absurd to attempt it, and the absurdity is conclusively proved in practice by the contradictory rulings

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[1] *Vide post*, §§ 68, 69, 70.

and tests promulgated by the various courts. How could it be otherwise? There cannot be two criteria of insanity, a legal and a medical, the one contradictory of the other, and both be correct. That which is false in science, cannot be true in law; and that cannot be health in law, which is disease in fact. When the law says that for an insane act the perpetrator is irresponsible, and the court announces to the jury as the true test of the insanity of the individual, a test or criterion which the expert on oath testifies is not a true test or criterion—a test which is scientifically false, and offers another test or criterion which the court directs the jury to ignore; obviously either the court or the expert is in error, for both cannot be right. It has been well remarked by Dr. Elwell,[1] himself both lawyer and doctor, in his excellent work, that it is exceedingly difficult, if not impossible, for a member of one profession to comprehend clearly the necessities or modes of thought of another profession upon any subject which may be viewed from the stand-point of either profession; and in offering the different and contradictory rulings of the courts as proof of the great want of uniformity or harmony

[1] Elwell, Malpractice, Medical Evidence, and Insanity, pp. 370, 371.

existing among them as to the criteria of insanity, possibly injustice may be unintentionally done them, in considering the proceedings from the medical instead of from the legal point of observation; some of the rulings were probably based upon a particular class of facts, and were not intended to be applied to cases in general; but, after making all due allowance for such, there remain sufficient, where the broad general principles are laid down, and which are directly contradictory, one of the other, showing that a deplorable want of uniformity exists; and some of the judges have taken trouble to make those contradictory opinions conspicuous. When Ladd,[1] J., in referring to the opinion of the English judges in conference assembled, remarks, "It is probable that no ingenious student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power that is required in perfect mental health. It is in effect saying to the jury the prisoner was mad when he committed the act, but he did not use sufficient reason in his

[1] State *v.* Jones, N. H., p. 388.

madness." The learned judge certainly does not endorse the opinion of the English judges, which will hardly be claimed to be based upon a particular class of facts; and, animadverting more pointedly, he, with a sarcasm worthy of Junius, continues: "It *may* be that mental disease sometimes takes a shape to meet the provisions of this ingenious formula; or, if no such case has ever yet existed, it is doubtless within the scope of Omnipotent power hereafter to strike with disease some human mind in such a peculiar manner that the conditions will be fulfilled; and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease. That is, when we can certainly know that although the false belief on which the prisoner acted was the product of mental disease, still that the . . . *motive* to the act did certainly take its rise in some portion of the mind that was yet in perfect health, the rule may be applied without any apparent wrong. But it is a rule which can safely be applied in practice that we are seeking; and to say that an act which grows wholly out of an insane belief that some great wrong has been inflicted is at the same time produced by a spirit of revenge springing from some portion or corner of the mind that has not been reached by the

disease, is laying down a pathological and psychological fact which no human intelligence can ever know to be true, and which, if it were true, would not be *law*, but pure matter of *fact*. No such distinction ever can or ever will be drawn into practice; and the absurdity as well as the inhumanity of the rule, seems to me sufficiently apparent without further comment." We think further quotations of courts *vs.* courts unnecessary here, as a reference to the few opinions reported in the Appendix will show that there is scarcely a conceivable view of the jurisprudence of insanity that has not been authoritatively affirmed and authoritatively denied from the bench, so that to speak of uniformity or harmony of opinion existing among courts on the subject has at least, the *appearance* of sarcasm; and yet, after quoting many more contradictory opinions of courts than are to be found in this work, Messrs. Wharton & Stillé strenuously argue against allowing experts to testify directly to the sanity or insanity of prisoners, on the ground of want of uniformity or harmony among experts, and gravely assert that "in legal practice, from the fact that in each State there is a final court of appeal, this difficulty" (want of harmony in the rulings of courts) "is obviated. We all know what the law is; or, if we do not, we

have the means, in each litigated case, of ascertaining such law."[1] From the cases reported it will be seen that "the difficulty is" not "obviated," and while we may all know what the law is *at present*, we are not certain of what it will be a year hence. When the Supreme Court of a State has declared what the law is, we know what it is *in that State, at that time*, but *from that ruling*, we do not know what the law is in any other State, nor what it will be should there be a change in the *personnel* of the court by death or voluntary retirement of some of its members. Sometimes the change of a single member would be sufficient to alter the law, as it frequently happens that the court is *almost* equally divided, as, for instance, in a recent case in the Supreme Court of the United States at Washington, if for any cause one of the judges had retired from the bench, who can tell whether Mr. Hayes or Mr. Tilden would have been President from 1876 to 1880? So, when the *personnel* of a State Supreme Court has been changed, who can tell whether the dictum of the English judges or that of Judge Ladd would be affirmed? Would "uncontrollable impulse" or "moral insanity" be affirmed or denied

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[1] Wharton and Stillé, Med. Juris., § 197.

as relieving from responsibility? Would the defence have to make the insanity clear beyond a reasonable doubt, or would the prosecution have to prove sanity after a presumption of insanity was raised? Would it be held that as an insane person cannot commit a crime, if the jury had any doubt of the prisoner's sanity they could not convict, as they were not certain that a sane man committed the act; or, would the "wild beast" theory of Judge Tracey be affirmed? It would appear, at least, to persons outside the legal profession, that if there is a mode of harmonizing the rulings of courts on insanity, those whose duty it was to have enforced that mode, have sadly neglected their duty.

§ 61. If, as is claimed for it, the "*physical media theory*" has been established, it necessarily follows that, insanity being produced by, and being a symptom of, physical disease or disorder, there can be no legal test that will meet the requirements of the thousand and one forms and symptoms of the diseases "that flesh is heir to;" therefore to expect a legal definition from the courts which will meet the exigencies of every case would be to expect from the courts an impossibility. Had it been possible, the presumption amounts almost to a certainty, that the many judges

and psychologists, so eminent and so profoundly learned in their respective departments, that their knowledge has enriched and adorned humanity for all time, would have made the discovery so much needed, and which they so much desired to make, as has been evinced by the almost numberless tests and definitions which they have from time to time furnished; not one of which, however, will bear the test of universal practical application. *Those who know most of any subject are the best able to define it.* Who know most of insanity, the legal profession or medical experts? Are lawyers or judges examined as expert witnesses in insanity trials? The legal profession concede their lack of skilled knowledge by requiring medical experts to testify, so as to inform the court and jury on a subject which can only be understood by a course of special study; as by such a course only can any person have the necessary knowledge to make a diagnosis of the case, and a proper diagnosis of the case is, in other words, pronouncing whether the person is sane or insane, and the reverse is quite as true, that he who presumes to determine the question of sanity or insanity presumes to diagnose the disease on which the insanity depends; and in this connection it would make no difference

whether the disease were considered mental or physical. Have members of the legal profession the special knowledge which would warrant them to make a diagnosis of either mental or physical disease? If not, let those who have the necessary knowledge determine it, and if the medical experts are considered incompetent to perform that part of their duty, then, in the name of reason and common sense, relieve them from the responsibility of treating and taking care of lunatics; as, on the correctness of the diagnosis must depend the appropriateness of the treatment; hence those who cannot be depended upon to correctly determine the nature of, ought not to be permitted to treat, insanity or any other disease; and, in the name of humanity, relieve the doubly unfortunate insane from the care and supervision of those who are incompetent.

§ 62. In America and Britain there are few interests more jealously guarded and few rights held more sacred than the liberty of the citizen, and yet in almost every State of the Union there are hundreds of persons forcibly deprived of their liberty and held in durance in insane asylums. These persons are received in asylums generally at the request of their next of kin, and on the certificates of two or more

physicians that they are insane. The ablest experts, the medical superintendents of the asylums, also pronounce them insane, many of them dangerously so, *but tried by the ordinary legal tests many of them would be pronounced not insane.* To improperly deprive a citizen of his liberty is a grave offence which the law is usually very prompt to punish. Now, if the legal tests of insanity are believed to be true and reliable by courts and lawyers, why is the law not invoked in behalf of the thousands improperly held in confinement in asylums, who would without doubt be declared not insane if tried by the "right and wrong" test as ordinarily applied in criminal cases? If these unfortunates are improperly deprived of liberty, as they must be if the legal tests are true (as the only question to be primarily decided is, what is the person's mental condition, is he sane or insane?), then why not apply those legal tests to their sad condition, and restore them at once to the sweets of liberty, home, and their families? If these "tests" of insanity were so used, it would be extremely hazardous for any person to send his friend, however dangerous to the community he might be, to an asylum, unless he were a raving maniac with no lucid intervals; and no person would take the position

of superintendent of an insane asylum, unless, indeed, he himself was insane, as verdict after verdict might be obtained against such officer for false imprisonment were the "knowledge" test of Justice Tracy, or the "right and wrong" test commonly used in criminal cases, made the criterion of such trials. The law says an insane person may be sent to, and confined in, an insane asylum; hence, *if the person is insane*, no action would lie for false imprisonment for his detention there; the law also says that an insane person cannot commit a crime, that he is irresponsible for his acts; therefore, to determine respectively the questions of "false imprisonment" and "responsibility," the one thing necessary in both cases is to decide whether or not the person was insane. *Per contra*, were the rulings of Hallock, B., and Crawford, J., to be authoritatively invoked in such cases as have been the subject of discussion, it would be almost impossible for a person to obtain damages, however wrongfully he might have been sent to, and kept in, an insane asylum, as *all doubts*, by their rulings, sustain the plea of insanity; and probably few sane persons forcibly taken to an asylum and kept there, suffering under the immediate smart of so gross an outrage, would conduct themselves with that calm-

ness and temperance which would leave *no* doubt of their sanity in the minds of the witnesses who saw them forcibly deprived of their liberty.

§ 63. Again the question arises, if in civil cases the question of sanity or insanity is a question of *fact* to be testified to by the expert witnesses and submitted to the court and jury, how can it be a question of law to be decided by the court in criminal cases? "It is plain that, under the present system, the judge does actually withdraw from the consideration of the jury some of the essential facts, by laying down authoritatively a rule of law which prejudges them; the medical men testify to facts of their observation in a matter in which they alone have adequate opportunities of observation; the judge, instead of submitting these facts to the jury for them to come to a verdict upon, repudiates them by the authority of a so-called rule of law, which is not rightly law, but is really false inference founded on insufficient observation,"[1] which "insufficient observation," be it remarked, was made by medical men of past ages; and Judge Doe very felicitously remarks,[2] "If it is necessary that the law

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[1] Maudsley, Responsibility in Mental Diseases, p. 102.

[2] Boardman *v.* Woodman.

should entertain a single medical opinion concerning a single disease, it is not necessary that that opinion should be a cast-off theory of physicians of a former generation."

The dire confusion, should experts be permitted to testify *directly* to the question of insanity, foreshadowed by Messrs. Wharton and Stillé in § 197, if well founded, would be a grave, if not fatal, objection to the method herein recommended, but we think there is much greater danger of that confusion occurring under the present system of trial. While *complete* uniformity will probably not be obtained so long as science is progressive and medical experts have the right of freedom of judgment, yet we believe that a near approach to uniformity would obtain, were experts, qualified and commissioned as here recommended, required by the courts to testify directly to the all-important question in such cases,—"Is the prisoner sane or insane?" Be it remembered that the experts have been thoroughly taught and instructed in the view of legal responsibility in such cases (assuming that the eminent legal gentlemen on the board of examiners had done their duty), and that they testify *directly* to the mental condition of the accused, after due personal examinations had, and not to misleading

hypothetical cases or speculative distinctions. The untrustworthiness of hypothetical cases has already been shown,[1] and not only are they likely to mislead, but the usual method of interrogating witnesses is also open to a similar objection, or, at least, to the objection, that it is not the method best calculated to secure the exact opinion of the expert witness. Medical experts are usually required to trace the connection between the *delusion* and the *act*, when both are alike *symptoms* of the pathological condition in which they have a common origin. The rational problem propounded should be to trace the *symptoms and effects to their cause or causes*, as nothing can be gained by tracing the relation between symptoms, except as together they may aid in diagnosing the exact nature of the disease, of which the symptoms are the characteristics.

§ 64. In § 198, Messrs. Wharton and Stillé say, "But, after all, we must next observe that the proposed submission of the tests to experts for decision is an illusion, for the court will have to explain what it is that the experts say. No court can abdicate its functions of weighing testimony and of declaring what

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[1] *Ante*, §§ 53–56.

testimony means. . . . So it must always be in cases of conflict of evidence. Yet to declare, supposing the testimony of experts to be 'law,' where the weight of this testimony lies, is really to declare what the law itself is." We were under the impression that "to declare what the law itself is" was peculiarly the province of the judge, but we did not suppose it was his duty to determine questions of *fact*, and the sanity or insanity of a person being a question of fact, and the experts are called only "when the premises upon which he founds his conclusions cannot be understood by the court or jury without study or knowledge on that special subject, or without the aid of the knowledge of persons whose skill is superior to their own."[1] The expert is called expressly to explain a special subject not understood by the court and jury, and yet the judge "will have to explain what the experts say;" a marvellously lucid and consistent arrangement, but not more unreasonable than for the court to "submit tests to experts for decision." The expert is called to determine whether or not a person is insane. He understands his specialty if he is an expert, the judge confessedly does not understand it, notwithstanding

[1] Elwell, p. 275.

which the latter assumes *superior* knowledge of the subject by directing the expert as to what are the tests or criteria on which his judgment must be based. As has been stated before, there cannot be two tests of insanity, a medical and a legal, *the one contradictory of the other, and both be correct.* And, if so, the insisting upon certain legal tests by courts, contrary to the opinions of experts, is only less absurd than it is pernicious. In § 199, Messrs. Wharton and Stillé say, "Nor can harmony be by any other course adjusted between civil and criminal law. In many classes of probate cases, the question of a testator's sanity is taken from the jury and determined exclusively by the court." If such is the practice, then there is *now* a grave want of harmony between the modes of procedure in the administration of the civil and criminal laws. In the one the judge sometimes determines the matter on his own judgment, and in the other it *must* be determined by the judge, assisted by a jury. Is it by lawyers and legislators who are in favor of "trial by jury" considered entirely safe to allow a judge, who may be profoundly ignorant on the question of insanity, to take a case from the jury and determine it exclusively himself? But the judge of probate may be profoundly ignorant of both *law* and *insanity*,

as in some States, Michigan for instance, men *who are not lawyers* are eligible to be, and have been elected, judges of probate. Under such a system it is not wonderful that there is a lack of harmony between civil and criminal courts in insanity cases, or that the people have little confidence in the courts when insanity is an element in the trial. In § 199*a*, Messrs. Wharton and Stillé most eloquently urge the danger of any infraction of the responsibility of judges. They say, "These points are not to be finally adjudicated by experts, who are neither appointed by the State, so as to be independent of party choice, nor are selected from their general judicial fitness, nor are bound by precedent, nor are advised before they come to a decision by counsel presenting fully both sides." In a categorical answer to these objections it might be urged that by the scheme hereinbefore suggested, the experts would be appointed by the State, and therefore would be as independent of party choice as are the judges, and would *necessarily* have the judicial and medico-psychological fitness. So far, the objections are fully met; as to precedent, it is expected that each one, being fully aware of the views of the whole, would give those views, except when occasionally the witness might entertain some views

at variance with those generally held, in which case, should it arise, he should give the views *sanctioned by experts as a body*, and then give his individual opinions, stating them to be such, and his reasons for differing from the authoritative exposition of expert opinions on the subject. While, however, this much would be reasonably expected from every expert witness, as only by that means could he give expression to the opinions of the *body* of which he was a single member, yet it is to be hoped that the body of experts would not yield such a slavish adherence to "precedent" as to ignore well-established facts, should such be presented in the progress of scientific investigation, even though they might conflict with a previously-held erroneous conclusion. The last of the series of objections does not appear to be important, as a free discussion of the subject among themselves would be much more likely to lead to a correct decision than would the advice of any number of counsel, confessedly uninformed on that subject, however eminent they might be as lawyers.

§ 65. Having, as we think, fully answered all the objections that have been urged against such changes as are here proposed, except that of harmonizing expert opinions, which will hereafter receive attention,

we would consider any further discussion of the subject as supererogatory were it not that we know that there are those in every profession who dread change, —who regard all departure from usages sanctioned by age as dangerous innovations,—and therefore consider it an imperative duty to keep strict guard at the professional portals. Such persons are useful, and their services are in frequent requisition and are of great value, through their careful examination of the basis and reasoning on which new propositions are sought to be established; but objecting to everything new is not an unalloyed good, as the objector sometimes, through fear of admitting error, fails to perceive the truth, or, if he perceives, fears to acknowledge it. Dr. William Harvey's theory of the circulation of the blood, although established "on the most solid and convincing proofs,"[1] was not generally received during his lifetime; nay, such was the opposition to it that his practice declined after the publication of his treatise, and the world was practically deprived of the benefits of that most important discovery, through the objections of Parisanus, Riolanus, and others, for over a quarter of a century. In like manner the world

[1] Hume, History of England, chapter lxii.

lost the incalculable benefits arising from the important discoveries of Dr. Jenner and Sir James Y. Simpson for many years through the same obstructive blindness, or, worse,—a refusal to acknowledge the truth when convinced. It is expected that objections will be urged, especially by some members of the legal profession, who will resist as dangerous innovations the changes herein urged as necessary, more particularly that of giving what may be considered as a quasi-judicial position to any person outside their own fraternity, and that of adopting any method not in accordance with "precedent," or sanctioned by "legal maxims" venerable at least by age. But would such objections be well taken? Many of the "precedents" and "legal maxims" regarding insanity have been shown time and again to be incorrect by experts, and, as before observed, that which is scientifically false cannot be legally true, nor can that be health in law which is disease in fact. Is it right to continue the use of any "test," "precedent," or "maxim" that is known to be scientifically false, when the application of the false tests, precedents, or maxims to cases in controversy must result in injustice being done, so far as they are depended upon in forming the verdict? Would it not be better to discard them at once and

leave the experts, who alone understand the subject, to apply criteria which they know to be correct, and testify to the result, giving their reasons therefor for the information of the court and jury? Let it be borne in mind that whatever views may be entertained of the nature and causes of insanity, it must be admitted to be a *special malady, that is understood only, and can be explained only, by skilled experts in that specialty*, and as such the expert witness, not the court, should explain to the jury what it is.

§ 66. This proposition again raises the question, Would it be safe to impose the responsibility of determining *directly*, so far as a witness can, the question of the sanity of a defendant, upon experts qualified and appointed as we have recommended? We unhesitatingly answer in the affirmative. In behalf of the medical superintendents of State insane asylums, and the profession of which they are members, we believe that they may as safely be intrusted with any responsibility for which they are professionally qualified as any other class of men. Let it be remembered that the responsibility, however grave and important, is not created by the recommendations here made; it already exists, and will continue to exist, irrespective of the question as to the individuals or classes on whom

it may rest. The gravity of the responsibility is undoubtedly great, and because of its greatness we earnestly urge that it be transferred from courts who confessedly do not, to experts who confessedly do, know all that is known of that most complex subject whence arises the responsibility. We think the physicians' duties as important, their usefulness as great, and their responsibilities as grave as those of any other profession, and as a class, in the discharge of those arduous duties and obligations, they bring to bear as much intelligence and as high educational and scientific attainments as do legal gentlemen in the discharge of their duties. True, physicians seldom occupy the high official positions which are so frequently attained to by members of the legal fraternity. Their training and habits of thought do not fit them for such positions, but their professional work is none the less important or useful on that account. Judges and lawyers have *occasionally* cases in which the issue to be decided is life or death. Medical men in large practice have the responsibility of cases in which life or death, health or disease, are in the balance, not *occasionally* but daily, nay, many times a day, and that for rulers of nations, gallant officers, learned judges, right reverend prelates, wise legislators, and

all grades between those classes, and the most obscure, wretched, and debased, ALL trusting their LIVES *unconditionally* to the probity and knowledge of physicians. If it is true that "all that a man hath will he give for his life,"[1] there cannot be a more grave responsibility laid upon any class than is imposed upon the medical profession by every civilized community. How that most important trust is administered will be properly answered by reference to the trust reposed in old, tried, family physicians. But their responsibilities are not restricted to their ordinary daily duties of healing the sick, and caring for the wounded. In courts of justice their services are important: as proof of this we need only mention the fact that many murderers would escape detection and punishment were it not for the chemical and pathological knowledge of physicians. Their disinterested usefulness is also conspicuously shown in their vast unrequited labors in the domain of sanitary science and hygiene,—the prevention of disease which they would be paid for curing,—in their demonstrating that insanity, the plague, scrofula on shipboard, and kindred maladies are not the

[1] Satan, Job ii. 4.

visitations in anger of an offended Deity, but are due to natural causes which might often be prevented. In epidemics of cholera, smallpox, yellow fever, etc., with a courage and philanthropy worthy of a Howard, physicians are always found at the post of danger, regardless of personal risk, and often without fee or pecuniary reward. It matters not to them how many people are stricken down by the dread disease, nor how many of themselves fall victims to the fell destroyer; when one dies another is ready to take his place—ready to breathe the noxious air of the pest-houses, where the contagion is so appalling that legal gentlemen often cannot be induced by any consideration, to visit patients *in extremis* who desire to make testamentary disposition of property; and, where the gallant soldier, who has perchance led a "forlorn hope" or "stormed a battery" with the utmost coolness and intrepidity, would blanch and tremble before "the pestilence that walketh in darkness"; yet, fully conscious of their danger, in the interest of suffering humanity physicians unflinchingly meet the terrible enemy, and by night and by day try to

"Foil his wild rage by steady skill,"

and in trying to save the lives of others they volun-

tarily sacrifice their own. The patriotic soldier offers his life in defence of the liberties of his country. If he lives, fame and renown may be his. If he dies, his memory is kept green by a grateful country, and his widow and children are cared for by the government. Not so the physician, who at such fearful personal hazard braves death, that others may live. No memorial day is set apart to keep the memory of his heroic self-devotion before the people whom he died to save. His last hours are not spent in the bosom of his family. No loving hands smooth his pillow. He suffers the agonies of dissolution in the pest-house among strangers, who cannot, if they would, help him. Death closes his career. His body, taken by the common dead-cart, is laid by strangers irreverently in his last resting-place. No funeral cortege; nay, so great is the terror of the dread contagion that not even his relations dare follow his sometimes coffinless remains to the grave. Thus fall, in every severe epidemic, men among the noblest of the race, in a cause as holy and with a courage as heroic as ever actuated martyr or patriot. How do States and nations recognize and reward such services?

> "Is the spot mark'd with no colossal bust?
> Nor column trophied for triumphal show?
> None."

No record is made by the State of their "faithfulness even to the death," and no pensions are bestowed upon their widows and fatherless children. "Homines ad Deos nullâ re propius accedunt, quam salutem hominibus dando."—*Cicero.* The gentlemen recommended to be *exclusively* used as experts in insanity cases are members selected for their special qualifications from the profession to which reference has just been made. Would they, *a priori,* be considered improper persons to intrust with *any responsibility, however great,* provided the duties imposed were of the class for which they were specially prepared by education and training?

§ 67. Suppose a case. Twin brothers, as nearly alike as possible in every respect, having pursued, with equal ability and industry, the same course of preparatory study. The one, after matriculation, studied law, the other, medicine. In process of time, after examination as recommended herein, the physician was declared eligible, and received the appointment of medical superintendent of a State asylum for the insane, at the same time his brother, the lawyer, was elevated to the bench. After, say, ten years, a murder case was tried before the judge, the only defence being insanity, and the only expert witness

called was the judge's brother. Which of the brothers would be able, most lucidly and scientifically, to instruct the jury as to whether or not the prisoner at the bar was or was not insane? The medical brother was called to *instruct* his brother the judge, as well as the jury, regarding a subject on which both judge and jury needed information of a special character. Is there any reason for supposing the physician would be less honest or trustworthy than his brother the judge? In several important respects they are equal. Both are public officers to whom have been committed grave trusts; both are responsible to the State or people for the administration of their trust; both are alike independent of the parties to the suit pending; and each is assumed to have been desirous of doing only that which was right. There *is*, however, an important difference between them. *The one understands the subject, and the other does not.* Suppose, still further, that the expert, in his examination, testified that the "right and wrong," or some other of the so-called legal tests of insanity, was erroneous and untrustworthy. What would be thought of the assumption, or rather presumption, of the judge were he to direct the jury that they must accept the "knowledge of right and wrong" as the true test,

notwithstanding his expert brother's testimony to the contrary? Leave out the consanguinity; and there remains what has occurred time and again, and must continue to happen for all time, unless the system undergoes a change. If the court "after all must explain what the expert says" to the jury, nay, must *flatly contradict* the expert witness, on the authority of some "precedent" or "maxim;" instructing the jury to decide as a question of law that which is a matter of fact, which the jury instructed by the expert witness ought to determine, we again ask, for what purpose was the expert called?

The *method* of taking expert testimony is open to another objection. An expert, being *amicus curiæ*, and expected to explain matters "not within the knowledge of the court and jury," should be permitted to arrange and present his explanations in the manner in which he can most accurately give a transcript of his views, whether orally or by deposition (but in either case to be subject thereafter to examination and cross-examination); as, in answering questions adroitly put, the necessary logical sequences are interrupted, and counsel interested on one side or the other may not always design that their questions shall expiscate the *whole truth*, but only so much of

it as will benefit their client; hence it often happens that the expert can only convey *a part* of his views to the court; and, a partial statement of a truth always misleads. As has been urged before, the expert witness should not be, even nominally, subpœnaed "on the part of the prosecution" or "of the defence," he should be "in behalf of the court." The bare supposition that his scientific knowledge is intended to be used for the advantage of either side is most pernicious; and, as he is expected to furnish information, not in the possession of either of the parties to the suit, for the benefit of the court and jury, he should be permitted to arrange and state his views in the manner he himself may think will most clearly convey his ideas and conclusions; as, by that method all parties who desire to know "the truth, the whole truth, and nothing but the truth," would be much better served than by the practice of having the experts answer only such questions as are put to them.

§ 68. The objection that "American common law courts have no process for the collection of the opinions of experts on litigated questions of criminal responsibility"[1] will now be considered. The distinguished

[1] Wharton and Stillé, Med. Juris., § 194.

authors just quoted in several succeeding sections descant very earnestly on the confusion that would follow for want of such a process, and declare that there is "no court of experts who can harmonize antagonistic views" of experts. The objection is an important one. All must admit the paramount importance of *uniformity* of procedure. We have shown that one important element in the uncertainty of the conviction or acquittal of a prisoner, where insanity is alleged, is the want of uniformity in the rulings of courts. Another element is the legal presumption that every physician is necessarily an expert in insanity. We have shown elsewhere in this chapter that that presumption is not according to fact, and we here frankly admit there is no hope for uniformity in the opinions of *such* so-called experts should the courts continue the practice of allowing them to give testimony in insanity trials. But while the opinions of irresponsible non-experts will probably continue to be contradictory one of another, quite beyond the hope of reconciliation, such would not, we believe, be the case if only experts in the correct use of the term were exclusively used by the courts, and if to the necessary professional qualification were added the *official responsibility* in the employment only of medical superintendents and

their first assistants of "State Asylums for the Insane," we have no doubt that almost, if not quite entire harmony of opinion would be reached with reference to all points affecting the mental condition of alleged insane criminals or testators.

It will be readily understood that it would be a much less difficult task to harmonize the opinions of one hundred and fifty to two hundred experts thoroughly acquainted both theoretically and practically with their specialty than it would be to reconcile the crude, absurd notions of seventy-five thousand to one hundred thousand physicians on an abstruse subject to which they had given no special attention. Independently of the vast difference in the number of opinions to be harmonized, a very important element in the problem is that those who are the least well informed on any professional subject are usually the most positive and dogmatic, while those whose knowledge is extensive and varied are generally more ready to hear and carefully examine, in the spirit of philosophical inquiry, all opinions on any subject under discussion, when fairly presented and reasonably supported.

§ 69. According to the *letter*, it is true that there is no "*court* of experts who can harmonize antago-

nistic views;" but substitute the word "organization," or "association," for "court" in the sentence, and it is not true; as will be seen by a reference to the organization known as the American Medical Association. The existence of this important Association being ignored by Messrs. Wharton and Stillé, a brief reference to its aims, organization, and work, appears to be necessary. In the plan of the Association's organization (May, 1846) it is "declared expedient for the medical profession of the United States to institute a National Medical Association," and its first aim is declared to be "to give *frequent*, *united*, and *emphatic expression* to the VIEWS and aims of the medical profession in this country." The Association is eminently a representative one, as, with a few unimportant exceptions, the only way to obtain membership is by being elected a delegate by any State or county medical society in the United States, provided the standard of admission to membership in such State or county society is in accordance with the requirements of the American Medical Association. *Permanent membership* in the Association may be had by any member who has been a delegate, on payment of yearly dues and by conforming to the rules, by-laws, and code of ethics. The Association

meets annually, the convention lasting four days. Usual attendance of members, eight hundred to one thousand. There are two sessions daily. The forenoon session is occupied by the reading of essays on subjects of *general* interest to the profession as a whole, discussion, etc. For convenience in the discussion of *special* subjects, the body is divided, in the afternoon, into five sections, to wit:

1. Practical Medicine, Materia Medica, and Physiology;[1]

2. Obstetrics and Diseases of Women and Children;

3. Surgery and Anatomy;

4. Medical Jurisprudence, Chemistry, and Psychology;

5. State Medicine and Public Hygiene;

and essays on *special* subjects are referred to the appropriate section, where, after being read and the subject fully discussed, a vote is taken, which vote announces the *opinion of the section;* and if unchallenged by the full convention, declares the opinion of the "Association;" which is the authoritative expression of the profession in the United States. (I refer exclusively to Allopathic, or what is commonly known

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[1] Trans. Amer. Med. Assoc., vol. xxviii. p. 654.

as "regular medicine," but am informed that the Homœopaths have a similar organization,—the American Institute of Homœopathy.) It will be seen how readily every subject in dispute in any department of medicine can be brought before the specialists of the appropriate sections and there be *authoritatively disposed of.* To illustrate: Dr. R. J. Patterson, of Batavia, Illinois, was requested to prepare a paper on the following subject: "Do the facts justify the recognition of 'moral insanity' as a distinct form of disease?" and to report to the next meeting of the American Medical Association. Accordingly, at the meeting held at Chicago, Illinois, in 1877, Dr. Patterson reported in a very able paper, reference of the subject having been made to the superintendents of "twenty-seven hospitals for the insane" for *facts* on which to base his conclusions, and his answer to the proposition is in the NEGATIVE.[1] During the free discussion had on the paper *not a single expert of this country then present* (and the attendance in the section was large) *took the affirmative side of the proposition.* Dr. Bucke, superintendent of the insane asylum at London, Canada, alone favoring the affirmative (he

[1] Trans. Amer. Med. Assoc., vol. xxviii. pp. 359–64.

having an *ex gratia* standing in the Association); hence it was *unanimously* decided by the vote then and there taken that the experts on insanity of this country do not recognize the existence of "*moral*" without "*intellectual*" insanity (the *mania sine delirio of Pinel*). At the same meeting, and in a similar manner, "the relations of spiritualism to medical jurisprudence" were also considered in a carefully-prepared paper by Dr. John P. Gray, of Utica, New York; and after discussion had thereon, the conclusion was unanimously reached "that a belief in spiritualism is not evidence of insanity, but in some cases it might be shown to be undue influence."[1] At the same meeting the writer read a paper on "Medical Testimony with Special Reference to Cases of Insanity,"[2] in which it was held that general medical practitioners are not experts in insanity, and ought not to be required or permitted to give testimony as such. The paper also introduced the "physical media theory of insanity;" and after discussion the paper was received and adopted. Now observe, that at a single meeting of the "American Medical Association" *four* "vexed questions" received their quietus,—*id est*, the opinion

[1] Trans. Amer. Med. Assoc., vol. xxviii. p. 353.

[2] Ibid., pp. 365–70.

of the medical profession was authoritatively pronounced. In justice to Messrs. Wharton and Stillé, we desire to say that these decisions had not been reached when they wrote that "the fact is there is no settled opinion of experts, because there is no final court by whom conflicts among experts can be reconciled and a settled law pronounced" (I use the edition of 1873 of their work), but the American Medical Association had at that time existed for over a quarter of a century, with all its capabilities and facilities for "giving united and emphatic expression to the views . . . of the medical profession of this country." It is also worthy of notice that the settled opinion of experts, confirmed by the medical profession, is reached and promulgated without cost or trouble either to the State or to suitors; whereas, in the law, to obtain the opinion of the Supreme Court, the usual procedure would be by appeal from the Circuit Courts, with the attendant trouble and expense. True, the decision of the "American Medical Association" would not bind the individual member, just as one of a bench of judges may dissent from the rulings of that body, but the declared opinion of the majority would, nevertheless, constitute the law, the dissenting minority to the contrary notwithstanding.

§ 70. The expert who conscientiously differed from the opinion of the majority would necessarily, when under the oath of a witness, testify to *his own opinions,* even if contradictory of the declared views which had received the *imprimatur* of the court of experts and of the medical profession, but his opinion would be as impotent as would be that of the dissenting judge, simply having whatever weight his individual ability or reputation could confer upon it. Even if no other expert were called upon to testify, his statements that those were his individual views, and were not supported, nay, were antagonized by experts generally, would carry their own refutation, as far as the particular views in which he was not in harmony with experts generally were concerned; because every expert would, if properly questioned, state what the views of experts as a whole were on *every topic* that had been brought before that body, and on which an authoritative conclusion had been reached.

Should the suggestions herein urged be adopted and become law, we think there is not the slightest doubt that the experts, in the interest of justice, and of their own reputations, would see to it that their views on all medico-legal questions which might properly occupy them before the courts would be *thoroughly har-*

monized. Give them to understand that the whole responsibility of testifying as to who are and who are not insane would rest with them; that they would be held to strict accountability for the manner in which they discharged their duty; and we venture to predict that they would be found to be eminently worthy of the trust. Being comparatively few in number and *all familiar with the subject,* if disinterestedness and ordinary probity are granted to them, they appear to have all the requisites for efficiently discharging that duty. It may be mentioned that in 1844 there was formed the "ASSOCIATION OF MEDICAL SUPERINTENDENTS OF AMERICAN INSTITUTIONS FOR THE INSANE," the prominent design of which was, "by a comparison of views and a careful study of what has already been done for the insane to secure for the future a higher standard for hospitals and a more liberal and enlightened treatment for all classes who are suffering from mental disorders."[1] This "Association" is composed of the chief medical officers of all the regularly organized institutions for the insane on the American continent, and holds its meetings annually. It has already done incalculable good by discussing the various plans, and adopting the best methods for

[1] Preface to "Propositions and Resolutions," p. 7, 1876.

treating that most unfortunate class, the insane. It may be remarked that the "Association" has not taken special notice of the duties of medical experts in insanity trials; but, should giving expert testimony be made their duty, and theirs exclusively, a slight change in their organization would afford them every facility for securing complete uniformity in opinion on almost every subject within their province; and, if complete harmony of belief could not be secured on some particular point, an authoritative statement of the views of the "Association" could be made by the majority; and the very remarkable unanimity (almost without exception) with which the large number of propositions and resolutions on all subjects connected with the insane have been received and adopted during the thirty-eight years the Association has existed, affords the strongest assurance that all its members would thoroughly harmonize their views, as experts, and thus it would "give to the jury the full renditions of science on the questions in litigation."

§ 71. In conclusion, we have shown that a misapprehension of the *nature* of insanity as a primary cause underlies the uncertainty of verdicts, and consequently the frequent miscarriage of justice in insanity trials.

From the extracts of "rulings of courts," to be found in the Appendix, which have been culled from an almost limitless number on record, it will be seen that "legal tests" have not in the past harmonized, and never can in the future harmonize, the questions of responsibility in insanity cases, as such "tests" are at variance with science; and that verdicts cannot be otherwise than uncertain will be readily apprehended when to these erroneous "legal tests" are added fallacious, misleading "hypothetical cases," untrustworthy testimony of unskilled witnesses improperly called experts, and last, but not least, having the "philosophy of the common law doctrine of insanity" depend upon an unverified theory.[1]

If it is true, as asserted by Messrs. Wharton and Stillé,[2] that in the "*certainty* at least as much as in the *wisdom* of the opinions promulgated lies our safety," the converse of the proposition must be equally true, viz.: that in the want of certainty of opinion and in the irrationality of procedure lie insecurity and danger. Where the law is uncertain there is no law.[3] Notwithstanding all our enlightenment,

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[1] Wharton and Stillé, Med. Juris., § 318.

[2] Ibid., § 197.

[3] "Ubi jus incertum, ibi jus nullum."—*Legal Maxim.*

and despite the unparalleled provisions that have been made for the care of the needy and unfortunate, the deplorable fact is continually forced upon our attention that there is a large class of cases in which it is a mere matter of haphazard whether the criminal shall be declared innocent, or the innocent person be executed! Surely the urgent necessity existing, for immediate and radical changes in the law and in the modes of procedure of the courts, which have for so long a time anomalously disgraced our civilization, justifies a demand in tones so earnest and peremptory that few will wish or dare to oppose the necessary amendments. All these elements of uncertainty, we believe, can be removed by the adoption of some such system as is herein proposed. The causes of uncertainty being removed, insanity trials would cease to be an opprobrium to the courts and to the medical profession, and verdicts would be as uniformly certain in criminal insanity trials as they are in any other class of cases, "a consummation devoutly to be wished." The plea of insanity would cease to be urged in defence of *sane* criminals as a *dernier ressort*, when the proof of guilt was irrefragable and no other defence tenable, as such prisoners could not then hope to escape the penalties due to their crimes through the

many acknowledged causes of uncertainty now existing, and the same *certainty* which would prevent the sane criminal escaping deserved punishment would, *cæteris paribus*, protect really insane persons, Baron Bramwell's dictum to the contrary notwithstanding.

Changes so radical in their nature and sweeping in their scope as those we have recommended could hardly be made without disturbing for a time some department of the legal machinery; but if the physical nature of insanity is admitted to have been established as a true principle, and we think it has, these laws can be amended and modes of procedure changed to accord with that principle, and the amended laws would ultimately be administered not only without friction, but with uniformity and harmony. That such changes will be made in the not distant future we believe; and then, students will look back upon the insanity trials of the present, with as much amazement as that with which we now regard witchcraft trials in the past; and we confidently believe these most important desiderata may be reached through the permanent establishment on a scientific basis of the medico-legal relations of insanity.

APPENDIX.

JUDGES' OPINIONS.

(The figures refer to the sections.)

"Wild-Beast Test"—Absolute Alienation of Reason Necessary, 72—Insanity no Bar to Responsibility, must be punished as a Warning to Others—Punishment of the Insane against Law, of Extreme Inhumanity, and is no Warning to Others, 73—"Right and Wrong" Test affirmed, 74—Last Opinion declared to be of Exquisite Inhumanity, absurd, and impracticable, 75—Total Insanity precludes a Trial, Insanity regarding the Particular Act sufficient—The Test lies in the Word "Power," had he Power to think and act rightly? 76—Did he know that the Act was forbidden by the Law?—An Offence against the Laws of God and Nature—Burden of Proof on the Accused, and must be Unquestionable, and Alienation absolute, 77—Must know that he was doing Wrong in the Act in Question—Must know that he was doing Wrong in the Act in Question and at the Time, 78—The Law does not recognize "Uncontrollable Impulse"—"Uncontrollable Impulse" no Defence, 79—Uncontrollable Impulse a good Defence—Under "Uncontrollable Impulse" the Act was not his Act, and he is not Guilty, 80—"Moral Insanity" relieves from Responsibility, 81—"Moral Insanity" affords no Relief from Responsibility—"Moral Insanity does not relieve from Responsibility, 82—Proof of Insanity rests on the Prisoner, if in doubt the Jury ought to convict—The Proof of Insanity to acquit ought to be as strong as of Guilt to convict, 83—The State must prove Sanity as well as Guilt—After the Presumption of Sanity has been removed, the State must prove Sanity as well as Guilt, 84—Preponderance of Evidence of Insanity ought to acquit, 85—A Reasonable Doubt as to Sanity ought to acquit—A Doubt whether

INSANITY MUST BE ABSOLUTE.

(*Wild-Beast Test.*)

§ 72. In the trial of Arnold, an undoubted lunatic, for shooting at Lord Onslow, in 1723, Mr. Justice Tracey said, "It is not every kind of frantic humor, or something unaccountable in a man's actions, that points him out to be such a madman as is exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute or wild beast; such a one is never the object of punishment."[1]

[1] Maudsley, Responsibility in Mental Diseases, p. 90.

In R. *v.* James Gibson, tried in Edinburgh, December 23, 1844, Lord Justice Clerk Hope directed the jury that . . . "the disorder must amount to an absolute alienation of reason."[1]

§ 73. *Not sure that it is not more necessary to punish a madman than a sane man.*

In Reg. *v.* Roberts, 1860, the prisoner pleaded guilty, and Baron Bramwell, addressing him, said, "That you are of unsound mind I believe, but that is no reason why you should not be punished. I address the explanation of the reasons why I pass upon you the sentence which I am about to pronounce, not so much to your understanding as to those around who hear me, and to those whose duty it is to notice them. The law makes unsoundness of mind no excuse for offences, except it were such that you did not at the same time know the nature of what you were doing, and that it was wrong and unlawful. No doubt it is very unfortunate that persons of unsound mind should become by that affliction less under the influence of moral restraints and of the restraints of law; but it would be sad indeed for the public if, when those restraints are weakened, the protection of the law were to

[1] Taylor, Med. Juris., vol. ii. p. 592.

be withdrawn by the extension of impunity to crime. I am not sure that it is not more necessary to punish a madman than a sane man, so far as the protection of the public is concerned. I feel bound to sentence you to the same punishment as if you were sane."[1]

Punishment of the Insane, can be no Warning to Others.

"The execution of an offender is, for example, *ut pœna ad paucos, metus ad omnes perveniat;* but so it is not when a madman is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others."[2]

§ 74. *The "Right and Wrong" Test affirmed.* This *legal test* was explicitly stated in the following terms by the whole of the (English) judges in conference, in answer to queries put by the House of Lords in the case of McNaughton, who was tried and acquitted on the ground of insanity (June 19, 1843): "Notwithstanding a party commits a wrong act while laboring under the idea that he was redressing a supposed grievance or injury, or under the impression of obtain-

[1] Taylor, Med. Juris., vol. ii. p. 593.

[2] 4 Bl. Com., 24.

ing some public or private benefit, he is liable to punishment. The jury ought in all cases to be told that every man should be considered of sane mind until the contrary was clearly proved in evidence; that, before a plea of insanity should be allowed undoubted evidence ought to be adduced that the accused was of *diseased mind*, and that at the time he committed the act *he was not conscious of right or wrong.* Every person was supposed to know what the law was, and therefore nothing could justify a wrong act, except it was clearly proved that the party did not know right from wrong; if that was not satisfactorily proved, the accused was liable to punishment. If the *delusion* under which a person labored were only *partial*, the party accused was equally liable with a person of sane mind. If the accused killed another in self-defence, he would be entitled to an acquittal; but if the crime were committed for any supposed injury, he would then be liable to the punishment awarded by the laws to his crime."[1]

§ 75. *The English Judges' Opinion condemned.* After reviewing the answers of the English judges, Judge Ladd remarks,[2] "The doctrine thus promul-

[1] Taylor, Med. Juris., vol. ii. p. 571.

[2] State *v.* Jones, N. H., p. 388.

gated as law has found its way into the text-books, and has doubtless been largely received as the enunciation of a sound legal principle since that day. Yet it is probable that no ingenious student of the law ever read it for the first time without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power that is required in perfect mental health. It is, in effect, saying to the jury, the prisoner was mad when he committed the act, but he did not use sufficient reason in his madness. He killed a man because, under an insane delusion, he falsely believed the man had done him a great wrong, which was giving rein to a motive of revenge, and the act is murder. If he had killed a man only because, under an insane delusion, he falsely believed the man would kill him if he did not do so, that would have been giving the rein to an instinct of self-preservation, and would not be crime. It is true in words the judges attempt to guard against a consequence so shocking as that a man may be punished for an act which is purely the offspring and product of insanity, by introducing the qualifying phrase, 'and is not in other respects insane.' That is, if insanity produces the false

belief, which is the prime cause of the act, but goes no further, then the accused is to be judged according to the character of motives which are presumed to spring up out of that part of the mind which has not been reached or affected by the delusion or the disease. This is very refined. It *may* be that mental disease sometimes takes a shape to meet the provisions of this ingenious formula; or, if no such case has ever yet existed, it is doubtless within the scope of Omnipotent power hereafter to strike with disease some human mind in such peculiar manner that the conditions will be fulfilled; and when that is done, when it is certainly known that such a case has arisen, the rule may be applied without punishing a man for disease. That is, when we can certainly know that although the false belief on which the prisoner acted was the product of mental disease, still that the mind was in no other way impaired or affected, and that the *motive* to the act did certainly take its rise in some portion of the mind that was yet in perfect health, the rule may be applied without any apparent wrong. But it is a rule which can safely be applied in practice that we are seeking; and to say that an act which grows wholly out of an insane belief that some great wrong has been inflicted, is at the same time produced by a spirit of revenge springing

from some portion or corner of the mind that has not been reached by the disease, is laying down a pathological and psychological fact which no human intelligence can ever know to be true, and which, if it were true, would not be *law*, but pure matter of fact. No such distinction ever can or ever will be drawn into practice; and the absurdity as well as the inhumanity of the rule seems to be sufficiently apparent without further comment. . . . It is a question of fact whether any universal test exists, and it is also a question of fact what that test is, if any there be."

§ 76. *The Total Alienation Test is discarded.* Beardsley, C. J., said,[1] "A state of general insanity, the mental powers being wholly perverted or obliterated, would necessarily preclude a trial; for a being in that deplorable condition can make no defence whatever. Not so, however, where the disease is partial, and confined to one subject, other than the imputed crime and contemplated trial. . . . In the case at bar the court professed to furnish a single criterion of sanity, that is, a capacity to distinguish between right and wrong. This, as a test of insanity, is by no means invariably correct; for, while a person has a very just perception

[1] Freeman *v.* People, 4 Denio, p. 27.

of the moral qualities of most actions, he may at the same time, as to some one in particular, be absolutely insane, and consequently as to *this* be incapable of judging accurately between right and wrong. If the delusion extends *to the alleged crime* or the contemplated trial, the party manifestly is not in a fit condition to make his defence, however sound his mind may be in other respects; still the insanity of such a person being only partial, not general, a jury, under a charge like that given by the court below on this case, might find the prisoner sane, for in some respects he would be capable of distinguishing between right and wrong. Had the instruction been, that the prisoner was to be deemed sane, if he had a knowledge of right and wrong in *respect to the crime* with which he stood charged, there would have been but little fear that the jury could be misled, for a person who justly apprehends the nature of a charge made against him, can hardly be supposed to be incapable of defending himself in regard to it in a rational way. . . . Where insanity is interposed as a defence to an indictment for an alleged crime, the inquiry is always brought down to the single question of a capacity to distinguish between right and wrong at the time when the act was done. . . . The act, in my judgment, must be

an insane act, and not merely the act of an insane person."

The Word "Power" comprises the True Test.

Judge Brewster, speaking for the judges of the Philadelphia Common Pleas, said, in 1868,[1] "The true test in all these cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?"

Did He know that the Act was forbidden by the Law?

§ 77. Lord Brougham said,[2] "If the perpetrator knew what he was doing; if he had taken the precaution to accomplish his purpose; if he knew at the time of doing the desperate act, that it was forbidden by the law, that was his test of sanity; he cared not what judge gave another test; he should go to his grave in the belief that it was the real, sound, and consistent test."

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[1] Wharton and Stillé, Med. Juris., § 159.

[2] Bennett and Heard, Leading Criminal Cases, 2d Ed., pp. 101–2.

Must know the Offence to be contrary to the Laws of God and Nature.

Lord Lyndhurst, in 1831, said,[1] "The question was, did he know it was an offence against the laws of God and nature?"

Burden of Proof on the Accused, and Insanity must be proved beyond a Doubt.

Sir James Mansfield (not Lord Mansfield), in Bellingham's case, 5 Carrington and Payne, 169, note, applied this test in the most general form to a prisoner indicted for murder. "In order to support such a defence," said he,[2] "it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; in fact, it must be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; *and that there was no other proof of insanity which would excuse murder or any other crime;* that in the

[1] Bennett and Heard, Leading Criminal Cases, 2d Ed., p. 102.

[2] Ibid., p. 102.

species of madness called 'lunacy' persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance; such persons committing crimes when they are not affected by the malady, would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil, they would be answerable for their conduct; and that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person is capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement."

§ 78. *The "Right and Wrong Test" modified.* Tindal, C. J., affirms the "right and wrong" test, but restricts it to the act in question. In "Regina *v.* Vaughan," 1 Cox, C. C., 80, he said,[1] "It was not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shown that the prisoner had no competent use of his understanding, so as to know that he was doing a wrong thing in the particular act in question."

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[1] Bennett and Heard, Leading Criminal Cases, 2d Ed., p. 103.

"Right and Wrong" Test further modified.

Parke, B., in Regina *v.* Barton, 3 Cox, C. C., 275, told the jury "there was but one question for their consideration, viz.: Whether at the time the prisoner inflicted the wounds which caused the death of his wife, he was in a state of mind to be made responsible to the law for her murder. That would depend upon the question whether he, at the time, knew the nature and character of the deed he was committing, *and if so, whether he knew he was doing wrong in so acting.*"[1]

§ 79. "*Uncontrollable Impulse*" *does* NOT *relieve from Responsibility.* In "Regina *v.* Pate," tried before Baron Alderson, in 1850, the learned judge said,[2] "It is not because a man is insane that he is unpunishable; and I must say that upon this point there exists a very grievous delusion in the minds of medical men. The only insanity which excuses a man for his acts, is that species of delusion which conduced to, and drove him to commit the act alleged against him. The jury ought to have clear proof of a formed disease of the mind, a disease existing before

[1] Bennett and Heard, Leading Criminal Cases, 2d Ed., p. 104.

[2] Ibid., pp. 104–5.

the act was committed, and which made the accused incapable of knowing at the time that it was a wrong act for him to do. *The law does not acknowledge the doctrine of an uncontrollable impulse, if the person was aware it was a wrong act he was about to commit.*"

In Regina *v.* Burton, 3 Foster and Finlayson, 780, Wightman, J., said,[1] "A man is responsible for his actions if he knows the difference between right and wrong. A state of mind under which a man, perfectly aware that it was wrong to do so, kills another under an uncontrollable impulse is no defence for a crime."

§ 80. *Uncontrollable Impulse* DOES *relieve from Responsibility.* In the Supreme Court of Pennsylvania, 1846, Gibson, C. J., said,[2] "But there is a *moral or homicidal* insanity, consisting of an irresistible inclination to kill or to commit some particular offence. There may be an unseen ligament pressing on the mind, drawing it to *consequences which it* sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this

[1] Bennett and Heard, Leading Criminal Cases, 2d Ed., p. 105.

[2] Wharton and Stillé, Med. Juris., vol. i. § 157.

mania is dangerous in its relations, and can be recognized only in the clearest cases."[1]

If the Act was done under "Uncontrollable Impulse," it was not his Act, and he is not responsible.

In the Commonwealth *v.* Rogers, tried in 1844, Shaw, C. J., said,[2] "In order to constitute a crime a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

"But these are extremes easily distinguished and

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[1] If the learned judge is correctly reported, it is to be presumed that his legal, was much more accurate than either his psychical, or anatomical knowledge. A ligament pressing on the mind, *id est*, a physical pressure on that which has neither extension nor place,* and is an incorporeal, intangible entity, requires explanation; and if the brain, the sometimes reputed seat of the mind, is intended, an explanation is still required, as *there are no ligaments in the brain.*

[2] Bennett and Heard, Leading Criminal Cases, 2d Ed., pp. 96, 97.

* Sir William Hamilton's Lectures on Metaphysics, p. 356.

not to be mistaken. The difficulty lies between these extremes in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases the rule of law, as we understand it, is this: a man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment; such partial in-

sanity is not sufficient to exempt him from responsibility for criminal acts. If, then, it is proved, to the satisfaction of the jury that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse. If so, then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it."

§ 81. *Moral Insanity* (*mania sine delirio*) *relieves from Responsibility.* In the Court of Appeals of Kentucky, 1864, Robertson, J., said,[1] "Moral insanity is now as well understood by medico-jurists, and almost as well established by judicial recognition, as the intellectual form. Mentally, man is a dualism, consisting of an intellectual and a moral nature. . . . No enlightened jurist now doubts the existence of such a type of moral, contradistinguished from intellectual insanity as *homicidal mania*, or morbid and uncontrollable appetite for man-killing; and *pyromania*, or

[1] Wharton and Stillé, Med. Juris., § 175.

the like passion for house-burning; *kleptomania*, or an irresistible inclination to kill" (steal?). . . . "But if his insanity extend no further than a morbid perversion and preternatural power of insane passion, or emotion, he not only knows 'right from wrong,' but knows also that the act he is impelled to do is forbidden by both moral and human law." And in 1869 the same judge took occasion further to enforce these views:[1] "According to matured philosophy and the corroborating authority of elementary writers, such as Prichard and Esquirol and Ray and Taylor, and of many modern adjudications, both British and American, there may be moral as well as intellectual insanity, and essentially distinguished from it. . . . While the senses are apparently sound and true, the affections may be perverted, or the moral sentiments unhinged in such a degree as to subjugate the *will* to some morbid appetite or ungovernable passion, and thus precipitate against the will insane but conscious wrong. This is contradistinctively called moral insanity."

§ 82. *Moral Insanity* (*mania sine delirio*) *does not relieve from Responsibility.* Against the above opinion Williams, C. J., said,[2] "In all the vague, uncertain,

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[1] Wharton and Stillé, Med. Juris., § 177.

[2] Ibid., § 178.

intangible, and undefined theories of the most impracticable metaphysician in psychology or moral insanity, no court of last resort in England, or America, so far as has been brought to our knowledge, ever before announced such startling, irresponsible, and dangerous propositions of law as that laid down in the inferior court. For if this be law, then no longer is there any responsibility for homicide, unless it be perpetrated in calm, cool, considerate condition of mind."

"Moral Insanity" does not relieve from Responsibility.

Thurman, J.,[1] "There is no authority for holding that mere moral insanity, as it is sometimes called, exonerates from responsibility."

§ 83. *Burden of Proof of Insanity on the Accused, and must be established beyond Reasonable Doubt.* Rolph, B., in "Regina *v.* Stokes," 3 Carrington and Kirwan, 188, says,[2] "If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to *make it clear* that he was insane at the time of com-

[1] Wharton and Stillé, Med. Juris., vol. i. p. 158.

[2] Bennett and Heard, Leading Criminal Cases, p. 129.

mitting the offence charged. The onus rests on him, and the jury must be satisfied that he was actually insane. If the matter be left in doubt it will be their duty to convict."

The Proof of Insanity to acquit ought to be as strong as that of Guilt to convict.

In the State *v.* Spencer, 1 Zabriskie, 202, Hornblower, C. J., said, with some emphasis,[1] "Where it is admitted, or clearly proved, that the prisoner committed the act, but it is insisted that he was insane, and the evidence leaves the question of insanity in doubt, the jury ought to find against him. The proof of insanity at the time of committing the act, ought to be as clear and satisfactory, in order to acquit a prisoner on the ground of insanity, as proof of committing the act ought to be, in order to find a sane man guilty."

§ 84. *Burden of Proof on the State, and the State must prove Sanity beyond a Reasonable Doubt.* In the Illinois Supreme Court, 1863, Fisher *v.* People, 23 Ill., 283, it was held that[2] "sound mind is pre-

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[1] Bennett and Heard, Leading Criminal Cases, p. 130.

[2] Wharton and Stillé, Med. Juris., § 159.

sumed if the accused is neither an idiot, lunatic, nor affected with insanity. If he be insane, sound mind is wanting and the crime is not established, therefore the burden is on the state to establish sanity, and not upon the prisoner to show insanity."

The Ingredients of an Offence cannot be separated, therefore, after a Presumption of Insanity has been raised, Sanity must be proved by the State.

In the People *v.* Garbutt, 1868, 17 Mich., 9, Cooley, C. J., said, "The prosecution takes upon itself the burden of establishing not only the killing, but also the malicious intent in every case. There is no such thing in the law as a separation of the ingredients of the offence, so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law. The presumption of innocence is a shield to the defendant throughout the proceedings, until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent. . . .

They (the prosecution) are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defence. But when any evidence is given which tends to overthrow that presumption, the jury are to examine, weigh and pass upon it with the understanding that although the initiative in presenting the evidence is taken by the defence, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt."

§ 85. *Preponderance of Evidence of Insanity will acquit.* In the Commonwealth *v.* Rogers, referred to, § 80, in answer to a question by the jury, the learned judge stated[1] "that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane."

§ 86. *A Reasonable Doubt as to Insanity ought to acquit.* In the trial of Daniel E. Sickles, United States Court for the District of Columbia, 1859, for the murder of Philip B. Key, Crawford, J., said,[2] "Whether a man is insane or not is a matter of fact; what degree of insanity will relieve him from respon-

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[1] Bennett and Heard, Leading Criminal Cases, p. 100.

[2] Wharton and Stillé, Med. Juris., vol. i. pp. 144–45.

sibility is a matter of law, the jury finding the fact of the degree too. Under the instruction of the court murder can be committed only by a sane man. Everybody is presumed to be sane who is charged with a crime, but when evidence is adduced that a prisoner is insane, and conflicting testimony makes a question for the jury, they are to decide it like every other matter of fact, and if they should say, or conclude that there is uncertainty, that they cannot determine whether the defendant was or is not so insane as to protect him, how can they render a verdict that a sane man perpetrated this crime and that no other can? Nor is this plain view of the question unsupported by authority. In the case of the Queen *v.* Ley, in 1840, Lewins, C. C., p. 239, on a preliminary trial to ascertain whether a defendant was sufficiently sane to go before a petit jury on an indictment, Hullock, B., said to the jury, 'If there be a doubt as to the prisoner's sanity, and the surgeon says it is doubtful, you cannot say he is in a fit state to be put on trial.' This opinion was approved in The People *v.* Freeman, vol. iv., Denio's Report, p. 9. This is a strong case, for the witness did not say the prisoner was insane, but only that it was doubtful whether it was so or not. The humane and, I will add, just doctrine that a rea-

sonable doubt should avail a prisoner, belongs to a defence of insanity as much, in my opinion, as to any other matter of fact."

Doe, J., says,[1] "Whether in this case the defendant had an insane impulse to kill his wife, and whether he could resist it, are questions of fact. Whether an act may be produced by partial insanity when no connection can be discovered between the act and the disease, is a question of fact. The defendant is to be acquitted on the ground of insanity unless the jury are satisfied beyond a reasonable doubt that the killing was not produced by mental disease."

§ 87. *Insanity a Question of Fact to be determined by the Jury, not a Question of Law to be decided by Judges.* In the State *v.* Pike, 49 N. H., 399, tried in 1870, Perley, C. J., and Doe, J., instructed the jury that "whether there was such a mental disease as 'dipsomania'" (which was the defence urged), "and whether the defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury,"[2] which

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[1] Wharton and Stillé, Med. Juris., § 108.

[2] Ibid., § 190.

was affirmed in the Supreme Court, Smith, J., saying,[1] "This was correct. If there are any diseases whose existence is so much a matter of history and general knowledge that the court may properly assume it in charging a jury, dipsomania certainly does not fall within that class. The court do not profess to have the qualifications of medical experts. Whether there is such a disease as dipsomania is a question of science and fact, not of law." Supporting the same view, Doe, J., said, ". . . Whether it is a possible condition in nature for a man, knowing the wrongfulness of an act to be rendered by mental disease incapable of choosing not to do it and of not doing it, and whether a defendant in a particular instance has been thus incapacitated, are obviously questions of fact. But whether they are questions of fact or of law, when an expert testifies that there may be such a condition, and that upon personal examination he thinks the defendant is, or was, in such a condition—that his disease has overcome, or suspended, or temporarily or permanently obliterated his capacity of choosing between a known right and a known wrong—and the judge says that knowledge is the test of

[1] Wharton and Stillé, Med. Juris., § 191.

capacity, the judge flatly contradicts the expert. Either the expert testifies to law, or the judge testifies to fact. From this dilemma the authorities afford no escape. The whole difficulty is, that courts have undertaken to declare that to be law which is a matter of fact." And in Messrs. Wharton and Stillé, § 108, the same judge is reported to have charged the jury, that "if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be not guilty by reason of insanity, if the killing was the *offspring or product of mental disease in the defendant.* Neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs is as matter of law a test of mental disease; but all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury."

§ 88. *Medical Opinions claiming Insanity to be a Disease declared vicious.* Lord Chancellor Westbury, in the House of Lords, declared on the 11th day of March, 1862, that "the introduction of medical opinions and medical theories into this subject has

proceeded upon the vicious principle of considering insanity as a disease."[1]

§ 89. *Legal Gentlemen profoundly ignorant of Mental Disease.* Doe, J., said,[2] "The legal profession, in profound ignorance of mental disease, have assailed the superintendents of asylums, who knew all that was known on the subject, and to whom the world owes an incalculable debt, as visionary theorists and sentimental philosophers, attempting to overturn settled principles of law; whereas, in fact, the legal profession were invading the province of medicine and attempting to install old exploded medical theories in the place of facts established in the progress of scientific knowledge."

§ 90. *Expert Testimony valueless.* In Regina *v.* Leander (Cent. Crim. Court, June, 1864), Bramwell, B., said,[3] "Although medical men were often heard in courts of justice to define insanity, he thought ordinary men of the world were just as well qualified to form an opinion on these matters as they were."

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[1] Hansard, clxv. 1297.

[2] State *v.* Pike, 49 N. H., 399.

[3] Taylor, Med. Juris., vol. ii. p. 477.

Expert Testimony not only valueless, but worse than that.

Davis, J., of the Supreme Court of Maine, went so far as to say,[1] "If there is any kind of testimony that is not only of no value, but even worse than that, it is, in my judgment, that of medical experts. They may be able to state the diagnosis of a disease more learnedly, but upon the question whether it had, at a given time, reached such a stage that the subject of it was incapable of making a contract or irresponsible for his acts, the opinion of his neighbors, if men of good common sense, would be worth more than that of all the experts in the country."

§ 91. *Expert Testimony of great value.* Ladd, J., in State *v.* Jones, in 1871, said,[2] "I may add that it confirms me in the belief that we are right, or at least have taken a step in the right direction, to know that the view embodied in this charge meets the approval of men who, from great experience in the treatment of the insane, as well as careful and long study of the phenomena of mental disease, are infinitely better

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[1] Wharton and Stillé, Med. Juris., § 294.

[2] Ibid., p. 192.

qualified to judge in the matter than any court or lawyer can be."

Testimony of Experts Competent Evidence and entitled to great respect.

In the Commonwealth *v.* Rogers, 1844, Shaw, C. J., said,[1] "The opinions of professional men on a question of this description are competent evidence, and in many cases are entitled to great consideration and respect. The rule of law on which this proof of the opinion of witnesses, who know nothing of the actual facts of the case, is founded, is not peculiar to medical testimony, but is a general rule, applicable to all cases where the question is one depending on skill and science in any particular department. In general, it is the opinion of the jury which is to govern, and this is to be formed upon the proof of facts laid before them. But some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pursuits and profession have brought that class of facts frequently and habitually under their consideration. . . . A familiar

[1] Bennett and Heard, Leading Criminal Cases, pp. 98, 99.

instance of the application of this principle occurs very often in cases of homicide, when, upon certain facts being testified to by other witnesses, medical persons are asked whether, in their opinion, a particular wound described would be an adequate cause, or whether such wound was, in their opinion, the actual cause of the death in the particular case. Such question is commonly asked without objection; and the judicial proof of the fact of killing often depends wholly or mainly upon such testing of opinion. It is upon this ground that the opinions of witnesses who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease at the time of its supposed existence. It is designed to aid the judgment of the jury in regard to the influence and effects of certain facts which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be had, are of great weight, and deserve the respectful consideration of the jury."

INDEX.

E.

F.

J.

L.

M.

N.

O.

T.

U.

V.

W.

THE END.